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By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. LXXXIII.

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AMERICAN STATE REPORTS.

VOL. LXXXIII.

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(100) **66**; (101) **70**; (102) **73**; (103) **76**; (104) **78**; (105) **80**; (106) **82**.

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(86; 32 Tex. Cr. Rep.) **40**; (87; 33 Tex. Cr. Rep.) **47**; (34 Tex. Cr.
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(91; 37 Tex. Cr. Rep.) **66**; (38 Tex. Cr. Rep.) **70**; (92) **71**; (39 Tex. Cr.
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UTAH.—(13) **57**; (14) **60**; (15) **62**; (16) **67**; (17) **70**; (18) **72**; (19) **75**; (20)
77; (21) **81**; (22) **83**.

VERMONT.—(60) **6**; (61) **15**; (62) **22**; (63) **25**; (64) **33**; (65) **36**; (66) **44**;
(67) **48**; (68) **54**; (69) **60**; (70) **67**; (71) **76**; (72) **82**.

VIRGINIA.—(82) **3**; (83) **5**; (84) **10**; (85) **17**; (86) **19**; (87) **24**; (88) **29**; (89)
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(98) **81**.

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40; (9) **43**; (10) **45**; (11) **48**; (12) **50**; (13) **52**; (14) **53**; (15) **55**; (16) **58**;
(17) **61**; (18) **63**; (19) **67**; (20) **72**; (21) **75**; (22) **79**; (23) **83**.

WEST VIRGINIA.—(29) **6**; (30) **8**; (31) **13**; (32, 33) **25**; (34) **26**; (35) **29**;
(36) **32**; (37) **38**; (38, 39) **45**; (40) **52**; (41) **56**; (42) **57**; (43) **64**; (44)
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(87) **41**; (88) **43**; (89) **46**; (90) **48**; (91) **51**; (92) **53**; (93) **57**; (94) **59**;
(95) **60**; (96, 97) **65**; (98, 99) **67**; (100) **69**; (101) **70**; (102) **72**; (103) **74**;
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VOL. LXXXIII.

(15)

CASES
IN THE
SUPREME COURT
OF
COLORADO.

**CALHOUN GOLD MINING COMPANY v. AJAX GOLD
MINING COMPANY.**

[27 Colo. 1, 59 Pac. 607.]

STARE DECISIS—REVERSING PRIOR DECISION.—An erroneous decision should not be continued, unless it has been so long the rule of action that greater injustice and injury will result by a reversal than by observing and following it.

STARE DECISIS—WHEN DOES NOT APPLY.—Where the decision of a tribunal is subject to review by one having superior authority over it, or the question determined may be passed upon by such tribunal in another case, the doctrine of stare decisis does not apply with full force until the same questions have been determined by the court of last resort.

MINES—RIGHTS OF LOCATOR.—PREVIOUS TO THE ACT OF CONGRESS OF 1872 relating to mining claims, the rights of a locator were limited to the vein upon which his location was made. The rights to surface ground attached only for the purpose of the convenient working of the vein so located, and no rights to any other vein, except the one upon which the location was made, were given.

STATUTES — CONSTRUCTION — CONFLICTING PROVISIONS.—The rule that as between conflicting sections in the same statute the last in order of arrangement controls is applicable only when there is an irreconcilable conflict between the different sections of the same act, and no reasonable construction will harmonize the parts.

MINES—CROSS-VEINS—PRIOR CLAIMANT'S RIGHTS.—Under United States Revised Statutes, section 2336, providing that "where two or more veins intersect or cross each other, priority of title shall govern," such provision refers to the intersection or crossing of veins either upon their strike or dip.

MINES — CROSS-VEINS — SPACE OF INTERSECTION.—Under section 2336 of the United States Revised Statutes relating to the ownership of cross-veins, which provides that the subsequent locator "shall have the right of way through the space of intersection for the purposes of the convenient working of the mine," the "space of intersection" means either the intersection of veins

or of conflicting claims, and grants a right of way to the junior claimant through such space for the convenient working of his mine upon the veins which he owns or controls outside of that space.

MINES—TUNNEL SITES—RIGHT OF WAY.—Under section 2323 of the United States Revised Statutes, providing for the running of tunnels for the development or discovery of mines, a tunnel site cannot be projected and its tunnel extended underneath a previous valid, subsisting location, for the purpose of discovering blind leads within such location.

MINES—TUNNEL SITES—BLIND LEADS—PRIORITY.—The locator of a tunnel site acquires no title to blind leads discovered in his tunnel within the boundaries of a prior valid, subsisting location not known to exist previously to the commencement of the work upon the tunnel.

MINES—PRIORITY OF LOCATION.—ALL RIGHTS conferred by a valid prior location, so long as it remains in full force and effect, are preserved from invasion and cannot be infringed upon or impaired by subsequent locations.

MINES—TUNNEL SITE.—UNDER SECTION 2323 of the United States Revised Statutes a tunnel site can only embrace unappropriated public domain, and no rights are conferred to extend such tunnel through previous valid, subsisting locations.

MINES — TUNNELS — UNDISCOVERED VEINS — PRESUMPTION.—In the absence of any proof to the contrary, the presumption attaches that all veins discovered in that part of a tunnel which extends under a prior valid, subsisting claim belong to the latter claim.

MINES—LOCATION—PATENTS.—AS AGAINST A COLLATERAL ATTACK, the action of the land department in issuing patents to mining claims conclusively settles that all steps necessary to constitute a valid location of such claims had been taken, including the discovery of mineral.

MINES—TUNNELS—ESTABLISHING CHARACTER OF VEINS—TRESPASS.—The locator of a tunnel site who attempts to initiate title to blind veins in his tunnel underneath a valid prior location is a trespasser, and is not entitled to develop such veins for the purpose of establishing their character.

W. E. So Relle, for the appellant.

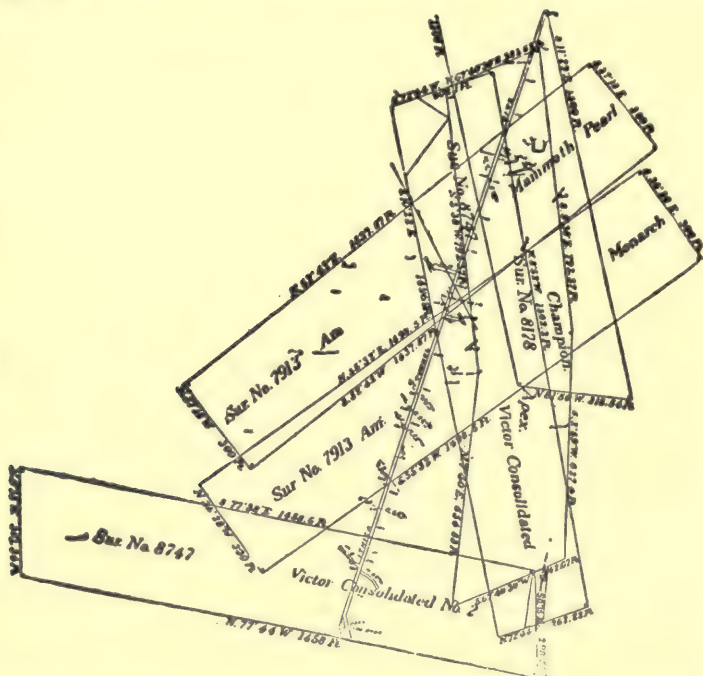
Colburn & Dudley and J. C. Helm, for the appellee.

3 GABBERT, J. Appellee, the owner of the Monarch, Mammoth Pearl, Apex, and Champion lode mining claims, commenced this action in the court below to recover damages and restrain appellant, as defendant, from removing ore claimed to be within the boundaries of these claims, and to which it asserted it was entitled by virtue of such ownership, and also to restrain defendant from prosecuting work upon a tunnel which the latter was excavating underneath such claims. Defendant answered, justifying its removal of ore and excavation of the tunnel upon two grounds: 1. That it was the owner of the Victor Consolidated claim, the vein of which crossed each

of those embraced within the claims of plaintiff; 2. That it was the owner of the Ithica tunnel site, projected across these claims, by virtue of which it was entitled to extend a tunnel underneath them. That in prosecuting work thereon, it had penetrated the claims of plaintiff, and discovered, located, and claimed numerous blind veins underneath the surface of such claims; that it had also cut the vein of its Victor Consolidated claim in this tunnel, underneath the surface of plaintiff's claims and removed ore therefrom of the value of four hundred dollars, and that it claimed to be entitled to excavate and run this ⁴ tunnel for the purpose of discovering such blind veins, to work and remove ore therefrom, and from its Victor Consolidated vein. By stipulation the Champion was dropped from the case. Upon the issues made by the pleadings, the facts thereby admitted, a stipulation as to those controverted, and certain documentary evidence, the cause was tried to the court, which resulted in a judgment adjudging plaintiff to be the owner in fee of each of its lode claims in controversy in their entirety as patented, and, inter alia, with respect to veins, "together with all veins, lodes, or ledges having their tops or apexes therein, and including all that portion of the said Victor Consolidated vein within the side and end lines of the plaintiff's said claims, extended downward vertically," for damages in the sum of four hundred dollars, and also enjoining defendant from prosecuting work upon, or extending its tunnel underneath, the claims of plaintiff, and, with respect to removing ore, enjoined defendant (employing the language of the judgment) "from further taking out, extracting, or removing ore by means of said tunnel, or otherwise, from within the side and end lines of plaintiff's said claims, extended downward vertically." From this judgment the defendant brings the cause here on appeal.

The controversy over the right of appellant to extend its Ithica tunnel is from the point where it enters the Monarch on the southerly side, and thence across the claims of plaintiff. The blind leads discovered are in that portion of the tunnel between the point where it enters plaintiff's claims on the south and the breast of its excavation. The vein of the Victor Consolidated is also cut in this tunnel at point marked 961. The conflict in the lode claims of the respective parties is included in the territory bounded by the south side line of the Monarch, the north side line of the Mammoth Pearl, and the side lines of the Victor Consolidated between these two lines. The reproduction of the plat (page 20), which

the parties stipulated below was correct, showing the relative location of the respective properties over which this controversy arises, will materially aid in understanding the questions involved.



⁵ We are relieved from stating the pleadings to any considerable extent, or determining the questions of law thereby presented, because on the trial below it was stipulated that the following are involved: "1. Whether or not the Ithica tunnel, in such pleadings described, is entitled to a right of way through plaintiff's lode claims; 2. Whether or not defendant has acquired, by virtue of said tunnel and tunnel site location, the ownership and right to the possession of the blind veins cut therein, to wit, veins or lodes not appearing on the surface, and not known to exist prior to the date of location of said tunnel site; 3. Whether or not defendant is the owner and entitled to the ore contained in the vein of its Victor Consolidated ⁶ claim, within the surface boundaries, and across plaintiff's lode claims; 4. Whether or not the defendant may in this cause introduce evidence for the purpose of showing that

there was no discovery of mineral in place on the Monarch and Mammoth Pearl claims of plaintiff, prior to the location of said tunnel site."

From the pleadings, evidence, and stipulation of the parties, the facts established, so far as material to the controverted questions of law involved, are, that each of appellee's claims was located prior to either the lode claim or tunnel site of appellant; that the receiver's receipt on each of the claims of appellee issued prior to the location of the tunnel site, and prior to the issuance of receiver's receipt on the Victor Consolidated; that the patents upon the lode claims of appellee issued prior to the patent on the lode claim of appellant; that the patent to the Apex issued prior to the location of the tunnel site, and on the Mammoth Pearl and Monarch subsequent to such location; that the vein of the Victor Consolidated was discovered and located from the surface, was not known to exist prior to such discovery, extends throughout the entire length of that claim, and on its strike crosses each of the veins in the claims of appellee upon which they were respectively discovered and located; that the tunnel cuts numerous blind veins underneath the surface of the claims of appellee, which do not appear upon the surface, and were not known to exist prior to the location of the tunnel; that the vein of the Victor Consolidated was cut in this tunnel underneath the claims of appellee, and ore of the value of four hundred dollars removed therefrom. It also appears that the patents upon the lode claims of appellee embrace the conflict with the Victor Consolidated without any reservation as to their surface or veins, and in this respect conform to the receiver's receipts upon such claims; that the patent on the Victor Consolidated excludes the surface in conflict with the claims of appellee, and all veins having their apex within such conflict, which are the same exceptions contained in the 7 receiver's receipt for that claim; that the portal to the Ithica tunnel site was, at the date of its location, on public domain; that work thereon was prosecuted diligently, and that the location of such tunnel was in all respects regular; that all necessary steps were taken by appellant to locate the blind veins cut in such tunnel which are in controversy in this case; that the record titles of the claims of appellee are vested in it, and the record titles of the Victor Consolidated, the Ithica tunnel site, and blind veins discovered therein under-

neath the claims of appellee are vested in appellant. The record discloses that appellant offered testimony tending to prove that at the date of the location of its tunnel site, mineral in place had not been discovered on the Monarch and Mammoth Pearl lode claims. The rights of the parties depend principally upon a construction of the following sections of the Revised Statutes of the United States:

"Sec. 2322. The locators of all mining claims heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, 1872, so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins, lodes, or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ^s ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

"Sec. 2323. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnels shall have the right of possession of all veins or lodes within three thousand feet from the surface of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six

months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

"Sec. 2338. Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection."

The main questions presented for our determination, for convenience, we summarize as follows: 1. Is appellant the owner and entitled to the ore contained in the veins of its Victor Consolidated claim within the surface boundaries of appellee's lode claims? 2. Has appellant acquired, by virtue of its tunnel site location, the ownership and right of possession to the blind veins cut therein underneath appellee's claims, and is its tunnel entitled to a right of way through the lode claims of appellee? 3. Should appellant have been permitted to introduce evidence for the purpose of showing that there was no discovery of mineral in place on the Monarch and Mammoth Pearl claims of appellee prior to the location of the Ithica tunnel site? All these were answered in the negative by the court below.

The first question presented involves, particularly, a construction of section 2336, *supra*. The rights of a junior location to the ore of its vein embraced in the conflict with a senior have been determined by this court in *Branagan v. Dulaney*, 8 Colo. 408, 8 Pac. 669, and in several subsequent cases, which have adopted the doctrine announced in that case on this subject, and if we adhere to the law as announced in those cases, then the rights of appellant to the ore in the vein of the Victor Consolidated included in the territory of that claim conflicting with that of appellee are fixed and settled; for under those decisions it would be entitled to all this part of its vein, except where it intersects the veins of appellee's claims. It is contended by counsel for appellee that the ruling in *Branagan v. Dulaney*, 8 Colo. 408, 8 Pac. 669, and cases following it, is wrong and that this question should now be reconsidered. In opposition to a reconsideration of the rights of cross-lode claimants, as declared by those cases, it is urged that the doctrine of *stare decisis* applies, and, even if wrong, should

not now be disturbed, because the rule therein announced has been established for such great length of time as to become a settled rule of property in this state. We are aware of the gravity of reversing a long-established precedent, and realize that it should not be disturbed except for the most cogent reasons; that the people of this commonwealth have a right to presume that when a question has been once settled by this court that its decision is correct and that all may rely upon it. We understand, generally, that when a decision has established a settled rule of property, upon which rights are predicated (and especially those relating to real estate), the law will be adhered to by the court announcing ¹⁰ it and those bound to follow its adjudications, even if erroneous (Black on Interpretation of Laws, sec. 152), but this rule is not inflexible. Courts are not bound to perpetuate errors merely upon the ground that a previous erroneous decision has been rendered on a given question. If it is wrong, it should not be continued, unless it has been so long the rule of action, and relied upon to such an extent, that greater injustice and injury will result by a reversal, though wrong, than to observe and follow it: Black on Interpretation of Laws, sec. 152; Sutherland's Statutory Construction, sec. 316; Boon v. Bowers, 30 Miss. 246, 64 Am. Dec. 159.

The law as announced in *Branagan v. Dulaney*, 8 Colo. 408, 8 Pac. 669, has led to much confusion, and has been a fruitful source of litigation. Under it doubts have been cast upon titles in mining properties, and supposed rights reduced to uncertainties. Judging by the experience of the past, coupled with the knowledge of the present great activity in mining, to some extent caused, perhaps, by the marked improvements in mining and the reduction of ores, this industry is comparatively in its infancy in this state; and if the rule regarding cross-leads as announced by this court is wrong, it will result in more injury in the future to perpetuate it than will temporarily be caused by its reversal. It is a matter of common knowledge that ever since the decision of this court on that question its correctness has been doubted by many eminent members of the bar of this state familiar with mining law, and has even been the subject of expression to that effect by this court—*Argonaut etc. Co. v. Turner*, 23 Colo. 400, 58 Am. St. Rep. 245, 48 Pac. 685, in which it was said, in speaking of the rights conveyed by patent to a mining claim, that it conveys all lodes or veins having their apexes within the boundaries of such claim; except, perhaps,

cross-lodes. This doubt has been generally entertained by those engaged in mining, so that, notwithstanding the length of time which has elapsed since the rendition of the first decision of this court on this question, it is safe to assume that it has not been implicitly relied upon as a sound exposition of the law relating to cross-leads, and that in the ¹¹ great majority of instances parties have governed themselves accordingly.

The law construed in *Branagan v. Dulaney*, 8 Colo. 408, 8 Pac. 669, is an act of Congress. The doctrine of *stare decisis* is based upon the assumption that the rules of law to which this doctrine applies have previously been determined by a court having final jurisdiction of the questions involved. For this reason, where the decision of a tribunal is subject to review by one having superior authority over it for that purpose, or the question determined may be passed upon by such tribunal in another case, the doctrine of *stare decisis* does not apply with full force until the same questions have been determined by the court of last resort. The construction of an act of Congress cannot be said to be authoritatively settled until passed upon by the highest court authorized so to do. This is the supreme court of the United States. It has never decided the question regarding cross-veins as presented in the case at bar. The decision of this court on that question may be reviewed by that tribunal; so that although this court has given the statutes affecting cross-lodes a construction which has since been followed in this state, nevertheless, as these same statutes are still open to construction by the highest tribunal of the land, their meaning on the subject of cross-leads as involved in this case has not been finally determined so as to become *stare decisis*. In Arizona, California, and Montana a different construction regarding the rights of cross-lode claimants has been given from that announced by the supreme court of this state: *Watervale Min. Co. v. Leach* (Ariz.), 33 Pac. 418; *Wilhelm v. Silvester*, 101 Cal. 358, 35 Pac. 997; *Pardee v. Murray*, 4 Mont. 234, 2 Pac. 16.

Whether or not the reasons given for this conclusion are sound is not material. Sooner or later this question must be determined by the supreme court of the United States, and when it is, the law thus settled must be followed by all the courts of the states and territories in which the act in question is in force. For these reasons, we conclude that although this court has passed upon the identical question ¹² regarding cross-veins now involved, it is not precluded from

again considering it, under the doctrine of stare decisis, or that the law as announced by this court in previous cases has become a settled rule of property in this state; and if upon a reconsideration of such questions we conclude that our previous decisions thereon were wrong, we should not wait for a superior tribunal to so declare.

Before proceeding, however, with a discussion of this question, we suggest that were it not for the expression in *Argonaut etc. Co. v. Turner*, 23 Colo. 400, 58 Am. St. Rep. 245, 48 Pac. 685, the action of the trial court, in refusing to follow *Branagan v. Dulaney*, 8 Colo. 408, 8 Pac. 669, would certainly be subject to criticism.

Previous to the act of 1872 relating to mining claims, which, with a few modifications, has been in force ever since its passage, the rights of a locator were practically limited to the vein upon which his location was made. That was the thing granted; the rights to surface ground only attached for the purpose of the convenient working of the vein so located; no rights to any other vein, except the one upon which the location was made, were given. Under the law then in force, the surface ground, with the vein located, varied, controlled as it was, in a great measure, by local rules, or, in their absence, by the judgment of the land department in each particular case, as to the area necessary for the convenient working of the mine, so that, as might be expected, the patents issued under the law prior to the act of 1872 embrace surface areas different and irregular in form. By this latter act a marked change was effected. The surface area which could be controlled by one location was definitely fixed, and this area being extensive, it was necessary that rights therein should be definitely declared. The rights of the locator to the mineral which might exist underneath such surface area was no longer limited to the one vein upon which he made his location. By section 2322, *supra*, it is expressly provided that, from and after the passage of the act of which it forms a part, the locators of all mining claims theretofore or subsequently made to which no adverse ¹³ rights had attached on the tenth day of May, 1872, upon compliance with the laws and regulations governing their title, shall have the exclusive right of possession and enjoyment of the surface included within the lines of such locations, and of all veins throughout their entire depth apexing inside of such surface lines extended downward vertically, although such veins might so far depart from a perpendicular in their course

downward as to extend outside of the vertical side lines. This section, standing alone, would seem to be clear, explicit, and unambiguous. It provides a test by which the right of a locator to a vein inside of the lines of his location extended downward vertically should be determined, namely, if the top or apex of a lode was within the boundaries of his claim, as above designated, then he should be the exclusive owner thereof, provided, of course, that no adverse rights thereto existed at the date of his location.

It is claimed by counsel for appellant that this section, by implication, excepts cross-veins, because no extralateral rights are given such veins, such rights being measured by the end lines of the claim extended in their own direction, and, as cross-veins would not intersect these lines, no extralateral rights would attach to such veins. That question is not involved in this case. Appellant is making no claim to any portion of the veins in controversy by reason of extralateral rights; and, besides, the vein of the Victor Consolidated is given no such rights, because by the judgment appellee is only declared to be the owner of that portion of the vein within the boundaries of its claims extended downward vertically. The most that can be said for this section on account of its phraseology is that cross-veins are not given extralateral rights; and yet we can conceive of a location where a cross-vein upon its strike may cross the one upon which the location is made and intersect both end lines; but granting, for the sake of the argument, that veins crossing the one upon which the location is made have no extralateral rights (but upon that question we express no opinion), this would only operate as a limitation as to such rights, and ¹⁴ not as to others which would attach by virtue of a location, for naming limits of a grant is not equivalent to saying that nothing is granted which does not extend to those limits: *Del Monte etc. Min. Co. v. Last Chance etc. Min. Co.*, 171 U. S. 55, 18 Sup. Ct. Rep. 895. It is by virtue of section 2336, particularly, that counsel for appellant contend that the portion of the vein of the Victor Consolidated in controversy belongs to the latter, their position being that by this section cross-veins are excepted from the operation of section 2322. It is the section construed in *Branagan v. Dulaney*, 8 Colo. 408, 8 Pac. 669. The rule adopted by the court in construing it in that case is an arbitrary one, and never resorted to except in cases where the different sections of an act are in conflict, namely,

“as between conflicting sections in the same statute, the last in order of arrangement will control”; and applying this doctrine, reached the conclusion that under section 2322, the locator of a claim acquired no rights to cross-veins apexing within the limits of his location.

The rule above announced is only applicable when there is an irreconcilable conflict between the different sections of the same act and no reasonable construction will harmonize the parts; but as the two sections under consideration do not conflict in all their terms, the real question presented in construing them is, Does the latter qualify the former? It is presumed that each section is intended to coact with every other of the act of which it is a part, and that no one is intended to antagonize the general purpose of the enactment: Sutherland's Statutory Construction, sec. 160. It is also a rule that in order to ascertain the legislative intent every section of an act is to be construed—that it is to be construed as a whole (Sutherland's Statutory Construction, sec. 160; *Parkinson v. State*, 14 Md. 184, 74 Am. Dec. 523), and that construction which renders the whole act harmonious and gives effect to every clause and part is to be favored: 23 Ency. of Law, 309; *Brooks v. Mobile School Commrs.*, 31 Ala. 227; *People v. Burns*, 5 Mich. 114; *Patterson v. Spearman*, 37 Iowa, 36.

In *Branagan v. Dulaney*, 8 Colo. 408, 8 Pac. 669, it was assumed that the “space of intersection” meant the intersection of the veins of conflicting ¹⁵ cross-locations, and as the mineral in this space was given to the prior location, and none other, that therefore the junior locator of a cross-lead had all the ore of his vein within the space of intersection of the conflicting locations, save at the space where the veins intersected. Section 2336 does not purport to provide for the location of cross-veins over territory included within a prior valid and subsisting location. Its purpose appears to be to fix the rights of the claimants of such veins, to settle what might otherwise be conflicting rights between claimants of veins crossing or intersecting each other, and provide easements for the benefit of the claimants of such veins (*Wilhelm v. Silvester*, 101 Cal. 358, 35 Pac. 997); and unless in making such provision it impliedly gives the junior cross-claimant the ore of his vein, except at the point where it intersects the vein of a senior location, the doctrine announced in *Branagan v. Dulaney*, 8 Colo. 408, 8 Pac. 669, cannot be upheld, so that in order to determine what rights are conferred upon a junior cross-claimant under this

section, the real question is, What is meant by the "space of intersection"?

The words employed in a statute are to be construed with reference to its subject matter and the objects sought to be attained (23 Ency. of Law, 322; *Brewer v. Blougher*, 14 Pet. 178; *Sedgwick's Statutory Construction*, 359), as well as the legislative purpose in enacting it, and its language should receive that construction which will render it harmonious with that purpose, rather than that which will defeat it: *Sedgwick's Statutory Construction*, 319; *Taylor v. Board of Commrs.*, 67 Ind. 383; *People v. Lacombe*, 99 N. Y. 43, 1 N. E. 599. When ambiguous, its general intent, as gathered from the statute, furnishes a key by which its ambiguities may be solved, and thus its words given that meaning which will harmonize with that intent: *Sutherland's Statutory Construction*, secs. 218, 219. Conditions with reference to the subject matter of the act, which it is apparent from its context it was necessary to provide for, may also be considered in ascertaining what is meant by that which is apparently ambiguous: *People v. Lacombe*, 99 N. Y. 43, 1 N. E. 599. It is evident from the provisions of section 2322 that the intent ¹⁶ of Congress was to give to the locator of a claim to which no adverse rights had attached every vein apexing within the surface boundaries of his location, unless its intent is negatived by section 2336. The words "intersect" and "cross," as used in this section, are not strictly synonymous, and in using both it must be presumed it intended to provide for different conditions. Veins might intersect, either on their strike or dip, and not cross; in that event, it was necessary to provide which location should have the ore at the space of intersection, and it was declared that the prior location should have the ore within that space. In case they crossed, then a further provision was necessary, and it was provided that the junior location should have the right of way through the space of intersection for the convenient working of his mine. From a casual reading of this section, it might be inferred that the "space of intersection" meant the intersection of the veins, but that does not necessarily follow, when its meaning, as ascertained by one or more of the canons of construction which may be invoked, is ambiguous, or different conditions exist which would control its import, or if, by giving it that limitation, the section in which it occurs conflicts with other portions of the act. Previous to May 10, 1872, as before noticed, no rights attached

to any vein except the one upon which the location was made. All rights which had attached previous to that date were in no manner disturbed: U. S. Rev. Stats., secs. 2322, 2344. In case of conflicting cross-locations made prior to that date, each locator would hold the vein located upon up to the point where they intersected on their strike. It was necessary to settle which should have the ore within the space of intersection of such veins, and, if they crossed, what further rights the junior locator should have. This was done. In such case intersection would clearly mean the intersection of the veins. In case of locations made under the act of 1872, or prior to that date, which were substantially parallel, the respective veins in each might either intersect or cross upon their dip, in which event it would be necessary ¹⁷ to provide which should be entitled to the ore within the space of vein intersection; and here again the meaning of "space of intersection," or the subject to which it refers, is the intersection of the veins. Again, under the conditions last noticed, the veins might unite, and, to provide for this contingency, it was declared that the prior location should take the vein below the point of union, including all the "space of intersection," which in that instance also refers to the intersection of the veins.

It may be urged that the construction thus far of this section is in conflict with section 2322, for the reason that under the latter the ownership of the space of intersection would depend upon which vein filled that space. Granted that this may be true, then we must invoke the rule that an act must be construed as a whole, and if the construction of section 2336 so far given modifies section 2322, it is not violating any rule applicable to the construction of different sections of the same act, which apparently conflict. This construction, however, does not cause any conflict between the two sections. The former gives to the locator the veins to which his rights attach throughout their entire depth, and if upon their strike, limiting the latter to rights which vested prior to the tenth day of May, 1872, or in descending into the earth, a body of ore bounded by the foot and hanging walls of his veins, extended in their general course, has been intruded, from another source, or if in descending they unite with other veins, these are not reasons why he should not be the owner of such spaces of intersection, or enlargements of his veins, caused by intersecting or uniting with others, but, on the contrary, according to the terms of section 2322, he should be, pro-

vided, of course, that his title is prior to that of the location of the veins intersecting or uniting with his; so that the construction of these sections, under the conditions noted, render them harmonious, and section 2336 simply recognizes that in conflicts in such cases priority of title should govern, a test which is clearly in harmony with section 2322, and limits the provisions of section 2336 thus far to easements only.

¹⁸ It may also be said that an easement would exist in favor of a junior claimant to follow his vein through the space of intersection caused by veins crossing upon their dip, because by section 2322 the locator is entitled to follow a vein in its course into the earth outside the vertical side lines of his location. This may be true, but as to veins crossing on their strike, no such right is impliedly given by that section, and as we have endeavored to demonstrate, such a right was necessary under conditions above noted. In case of locations made subsequent to the act of 1872 which cross each other, or those made under that act which likewise conflicted with locations made prior to the date it took effect, it was also necessary to provide for possible conditions, namely, the respective rights of the claimants of such locations, within the conflict of their claims, and particularly for a right of way for the junior claimant; and the vital question now to determine is, What is meant by the space of intersection in such cases as employed in section 2336, and which party would own the ore of the vein of the junior location within that space? We again reiterate that the clear intent of section 2322 was to give the locator of a claim to which no adverse rights were in existence at the date of his location all veins apexing within its surface boundaries. That eminent jurist, Mr. Justice Brewer, with his extended experience in mining litigation, certainly spoke advisedly, in *Del Monte etc. Min. Co. v. Last Chance etc. Min. Co.*, 171 U. S. 55, 18 Sup. Ct. Rep. 895 (although the precise question now being considered was not there presented), when he said, in speaking of the rights of a locator under the provisions of this section: "Every vein whose apex is within the vertical limits of his surface lines passed to him by virtue of his location. He is not limited to only those which extend from one end line to another or from one side line to another, or from one line of any kind to another; but he is entitled to every vein whose top or apex lies within his surface lines." To the same effect is the language employed in *Wilhelm v. Silvester*, 101 Cal. 358, 35 Pac. 997. By that section, he has been given title to all such veins. Such

being the case, was it intended by section 2336 to modify that grant, or vest title in a cross-claimant ¹⁹ to any part of a vein apexing within the boundaries of a prior valid location, and especially, what rights were intended to be granted or fixed under the conditions now being considered?

It provides that in such cases priority of title shall be the test by which the ownership of the ore at the space of intersection shall be determined. That is in accord with the rights conferred by section 2322. So stating, however, is not equivalent to a grant. That language does not import that an exception is carved out of an estate which has already passed. Under the facts now in mind, the senior locator, by virtue of section 2322, would own the ore of the junior cross-vein within the boundaries of his location, and before that right could be divested under section 2336, it must appear from the wording of the latter that such right is thereby expressly excepted. That the language of this section is not susceptible of the construction that creates such an exception, it seems to us is clear, when we bear in mind that which we have already stated—that it does not pretend to deal with the location of cross-veins over senior valid locations, but the purpose of which was to provide for easements and settle rights which otherwise might be doubtful or the subject of controversy, without some further declarations than those contained in section 2322; and so we conclude that to render the two sections harmonious, the space of intersection as used in section 2336, when applied to the facts now being considered, means the intersection of the claims: *Barringer & Adams on the Law of Mines and Mining*, 472, 473.

Under section 2322 no rights were given the owner of a location crossing a prior one to invade the latter for any purpose in following his vein upon its strike. This was an important matter; without such right a portion of his claim might be rendered valueless, but if the expression, "space of intersection," is limited to the intersection of veins as the space through which he should have a right of way for the convenient working of his mine, it would be of no avail, for he would have no right under which he could reach that easement; ²⁰ and so again, in order to recognize one which would be of any value to the junior cross-claimant, the space of intersection must also mean the intersection of the claims: *Morrison's Mining Rights*, 9th ed., 115. The learned author of the work just cited, in treating the subject of title to ore

included in the space of intersection as between conflicting cross-locations, under section 2336, gives the following cogent reasons why, in his opinion, as between such locations, the owner of the junior has a right of way through the senior, but no right to the ore of the claim which he crosses:

"It was within the power of Congress, by a subsequent clause, to have made the crossing lode an exception carved out of the general grant of the words of the previous section, but has it attempted so to do? The only grant of section 2336 is the right of way, which of itself implies that it is not a grant of the vein, but of an easement, to which the estate of the prior location is made servient."

"To give any part of the space of intersection to the holder of the later location would be to take from the older location something already granted to it. To create an exception out of his grant as he originally takes it, under act of Congress, would require in the wording of the act expressions as strong as are required to create an exception in a deed. An exception is equivalent to the reconveyance of land already conveyed. A right of way is not an exception, but a reservation which may be inferred from any wording indicating an intention to create an easement. It takes nothing from the body of the grant of the first locator, but compels the first locator to use or hold his grant or claim subject to a right or privilege to the junior or overlapping claimant of reaching the other end of his claim by passage through the senior location."

Under the conclusion reached in Arizona, California, and Montana, in the cases above cited, the ore within the space of overlapping claims would belong to the owner of the senior location. In the Arizona case, that conclusion was reached upon the ground that the expression "space of intersection"²¹ meant intersection of the veins; that they might so intersect upon either their strike or dip; but as to the former, it was limited to locations made prior to the tenth day of May, 1872. The learned judge who wrote the opinion in that case appears to have given it careful consideration, but in seeking to harmonize the two sections, it seems to us, fell into the error of (1) holding that the space of intersection meant intersection of veins only; (2) imposed a limit upon the provisions of the section when he announced that it only applied to the intersection of veins upon their strike, under locations made prior to May 10, 1872, which is not warranted, either expressly or by implication; and (3) by so doing neces-

sarily deprived a junior location, made under the act of 1872, of the right of way across a senior location, if the former crossed the latter. In the California case, the eminent jurist who wrote the opinion seems to have entertained similar views regarding the application of this section to rights which vested prior to May 10, 1872, but, except as to those rights, inclined to the conclusion that this section only referred to the intersection of veins upon their dip, which would also result in depriving a junior cross-claimant of a most important right. We think that Chief Justice Beatty, who concurred in the opinion in that case, more nearly announced the true doctrine when he said:

"I think, however, that too much is conceded, both in the opinion of the court and in the argument of counsel for respondent, in assuming that the provisions of section 2336 cannot be applied to locations made since the passage of the mining law of 1872 on veins which intersect upon their strike, without bringing it in conflict with the plain terms of section 2322. This wholly unwarranted assumption has been the source of all the trouble and difficulty which the land office and some of the state courts have encountered in their attempts to construe provisions of a statute which are in perfect harmony, but which have been erroneously supposed to be inconsistent."

The opinion in the Montana case is not altogether clear, ²² but seems to limit the space of intersection, as applied to the facts there presented, to the intersection of the conflicting claims, but does not enter into a discussion of the subject; so that although we agree with the conclusion reached in each of those cases, we cannot accept the limitations imposed upon the provisions of this section, or indorse the reasons advanced by the learned writers of the opinions in the Arizona and California cases.

Our conclusion is, that the provisions of section 2336 apply to locations made under the act of 1872 as well as before, refer to the intersection or crossing of veins either upon their strike or dip; that the space of intersection, in determining the ownership of ore within such space, means either intersection of veins or conflicting claims, according to the facts in each particular case, and grants a right of way to the junior claimant for the convenient working of his mine through such space upon the veins (underneath the surface) which he owns or controls outside of that space. This construction renders the two sections entirely harmonious, gives effect to

every clause and part of each, and in so far as section 2336 regulates or in any manner provides for rights as between conflicting claims, it applies only to intersections consistent with all the provisions of section 2322.

As we understand the rulings of the land department in issuing patent for conflicting mining claims, there is always excepted from the surface of the junior that portion conflicting with the senior, as well as all veins apexing within such conflict. This practice is in accord with our views, and, although such a construction would not be controlling, the interpretation put upon the act by those whose duty it has been to construe, execute, and apply it, is entitled to much weight: 23 Ency. of Law, 339; *Frost v. Pfeiffer*, 26 Colo. 338, 58 Pac. 147; *People v. Le Fevre*, 21 Colo. 218, 40 Pac. 882.

The receiver's receipt, as well as the patent issued appellant, excepted therefrom all veins apexing within the conflict between its claim, the Victor Consolidated, and those of appellee. The patents to the latter granted all such veins, and ²³ thus all rights attaching by virtue of priority of location have been preserved to appellee. The location of the Victor Consolidated was junior to that of the claims of appellee, and from this fact, and the views expressed, it follows that appellant cannot complain of the judgment of the lower court in so far as it awards to appellee the vein of the Victor Consolidated, and all veins apexing within the boundaries of the claims of the latter, and awarded damages for the removal of ore. These views are in conflict with the case of *Branagan v. Dulaney*, 8 Colo. 408, 8 Pac. 669, and that case, as also those of this court following it, in so far as they conflict with the doctrine now announced regarding conflicting cross-claims, are overruled. The language of the judgment of the lower court regarding the rights of appellant in the conflicting territory is very explicit, but only extends to acts of trespass, and does not prohibit those which it may exercise therein by virtue of its ownership of the Victor Consolidated claim.

The determination of the second question presented involves a construction of section 2323, *supra*. The contention of counsel for appellant is that in all patents for lode claims blind leads are excepted, and that the patentee takes no title thereto by virtue of patent. In answer to this, we have only to advance one step further in the construction of section 2323, and call attention to the fact that the test there applied by which the ownership of veins embraced in a valid, subsisting

location is determined is, that they apex within the boundaries of his claim extended downward vertically, without regard to where such apexes may be with reference to the surface; so that again the question presented is, Does section 2323 conflict with, or in any manner modify, the provisions of section 2322? And in construing them the same rules must be observed relative to the construction of an act containing different sections that have already been invoked. The former provides what rights may be acquired to blind veins discovered in a tunnel run for the development of the vein, or for the discovery of mines, but upon what ground may such tunnel be run, or within what territory must the blind ²⁴ leads discovered therein be located, in order to give the discoverer any rights thereto? A valid location of a mining claim, so long as it is in full force and effect, operates as a bar to a second of the premises so claimed: *Belk v. Meagher*, 104 U. S. 279; *Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. Rep. 1110; *Del Monte etc. Min. Co. v. Last Chance etc. Min. Co.*, 171 U. S. 55, 18 Sup. Ct. Rep. 895. The only exception is that a given location leaves open to others such rights therein as do not attach by virtue of such location; in other words, that a location only carries with it such rights as it is entitled to under the law by virtue of which it is made, and that rights not attaching are reserved to others. It is upon this ground that appellant contends that its right to the blind leads in question attach; that is, that under section 2323 these veins are impliedly excepted from the locations and patents of appellee's claims. If such a conclusion can be deduced from the sections under consideration, they are hopelessly in conflict, for first there is granted all veins the ownership of which is determined in the manner we have designated, including blind, and then immediately following the grant to the latter is withdrawn. A location can take no rights which conflict with a prior valid one, so long as it is kept alive. The law contemplates, and the authorities recognize, that the very life of a mineral location depends upon the fact that it is made upon unappropriated mineral domain, and with the one exception already noticed, this requirement extends to the entire location, that is, it cannot embrace any ground, nor can it initiate any rights within the boundaries of a prior valid, subsisting location, except those reserved from the latter. This rule extends to all classes of mineral locations; in other words, priority determines the rights between conflicting locations. The tun-

nel of appellant was commenced upon ground open to location, but at the time it was located and work thereon commenced the ground embraced within the claims of appellee had already been located and claimed as lode claims, so that the rights of appellee to the ground within the boundaries of its claims, and the leads in question, had attached before appellant ²⁵ attempted to initiate any title thereto, and, therefore, none attached by virtue of the location of, or work upon, its tunnel site, unless it appears that by virtue of section 2323 a tunnel for the discovery of blind leads may be projected across and extended into prior valid, subsisting locations, and title to the blind leads discovered within the boundaries of such claims thus be secured. It provides how inchoate rights to blind veins may be initiated; how they may become absolute; but nowhere does it in terms, either expressly or impliedly, declare that for these purposes it may be projected into or across prior valid locations. To give it the interpretation that it does is to inject a meaning of which it is not susceptible, renders it irreconcilable with the provisions of the section preceding, and overthrows the doctrine of priority—the foundation upon which mining rights rest. It does not provide that under a location for tunnel site purposes a right is granted to search for minerals in lands belonging to another, or that thereby a location for such purposes can be carved out of appropriated public domain, while limiting it to locations for tunnel site purposes to ground not previously appropriated renders it harmonious with section 2322. That the latter was the clear meaning and intent of Congress in passing the act of which these two sections form a part is apparent from the further reading of section 2323, which in terms provides that locations on the line of the tunnel contemplated by this section of veins not appearing on the surface made by others after the commencement of work thereon, and while it is being prosecuted with reasonable diligence, shall be invalid—a clear recognition of the controlling principle of priority. Counsel for appellant assert that *Enterprise Min. Co. v. Rico-Aspen Min. Co.*, 167 U. S. 108, 17 Sup. Ct. Rep. 762, and *Ellet v. Campbell*, 18 Colo. 510, 33 Pac. 521, affirmed in 167 U. S. 116, 17 Sup. Ct. Rep. 764, are authority for their propositions, that blind leads are excepted from all locations and patents; that no rights to such leads attach until discovered; that a tunnel site may be projected across and its tunnel extended underneath previous valid, subsisting locations, and title to blind ²⁶ leads discovered in such tunnel within the

boundaries of such claims, not known to exist previous to the commencement of work thereon, may be thus acquired by the owner of such tunnel. Neither of such cases so hold, and while they cannot be said to be directly in point, because the facts in the case at bar and those are entirely different, yet by analogy the principle upon which the right to blind leads discovered and located under the section of the statute relative to tunnel sites which was applied in those cases is the same as that upon which we base our decision here, viz., priority of location, for in each of those cases the tunnel site was located prior to the date of the location of the lode claims within territory embraced within the tunnel site location, and within the boundaries of which the blind leads were discovered and located, which were the subject of controversy. It was upon this ground, as we read and understand the opinions in these cases, in connection with the facts, that the inchoate rights of the tunnel claimants to such leads were predicated, and by virtue of which, when discovered on the line of the tunnel, they become absolute. On the subject under consideration, one further question needs to be determined, namely: Has appellant a right of way for its tunnel through the territory of appellee? It is contended by counsel for appellant that, under section 2338 of the Revised Statutes of the United States and section 3141 of Mills' Annotated Statutes, it is entitled to such right. The first of these sections provides that in the absence of necessary legislation by Congress, the legislature of a state may provide rules for working mines involving easements, drainage, and other necessary means to their complete development, and that these conditions shall be fully expressed in the patent. The section of Mills' Annotated Statutes referred to provides that a tunnel claim, located in accordance with its provisions, shall have the right of way through lodes which may lie in its course; but it will be observed that this section only refers to tunnels located for the purpose of discovery, and if any of its provisions are still in force, which appears to be doubted in *Ellet v. Campbell*, 18 Colo. 510, 33 Pac. 521, they can have no ²⁷ application to the case at bar, because the section of the Revised Statutes only provides for easements for the development of mines; and the section of Mills' Annotated Statutes relied upon does not attempt to confer any such rights, but is limited to the one purpose of discovery. In this respect it has been clearly superseded by the act of Congress, so that if appellant is

entitled to the right claimed, it must attach by virtue of some provision of this act.

Mining rights are statutory, but not purely so. They relate to real estate, and such rights as are not defined or limited by statute are still controlled by the rules of the common law. Such rights as are conferred by a valid, prior location, so long as it remains in full force and effect, are preserved from invasion and cannot be infringed upon or impaired by subsequent locations (Lindley on Mines, sec. 363), and are as fully protected under the rules of the common law as any other classes of real estate. Under the statutes, the subsequent locator has no right to penetrate a senior valid, subsisting location underneath its surface boundaries extended downward vertically, except for the purposes specified in the mining laws. We will not undertake to specify what these exceptions may be, but, so far as they are not fixed by statute, the possession and enjoyment of the ground underneath the surface of a valid, subsisting location cannot be invaded. These exceptions do not include a right to drive a tunnel through such a location for the purposes of discovery.

We are not aware that the precise questions presented for our determination, which we have designated as proposition second in the former part of this opinion, have ever been passed upon by an appellate court. In the case of *Stratton v. Gold Sovereign etc. Co.*, 1 Mill's Legal Adviser, 350, in which case complainant brought an action to restrain defendant from extending a tunnel through the claim of the former, which had been located prior to the date of the tunnel site, the defendants answered that they were driving such tunnel for the avowed purpose of discovering ²⁸ and claiming blind veins within the territory of complainant's claims. Complainant applied to Judge Hallett for a temporary injunction, which he granted, and in the course of his opinion said: "Chapter 6 of the Revised Statutes provides for three kinds of locations on the public mineral lands, which, in common speech, are called 'lode locations,' 'tunnel locations,' and 'placer locations.' When a location has been properly made in either class, and so long as it shall be fully maintained by use and enjoyment, or by patent, the territory embraced in such location is not subject to adverse location by a claimant of the same class or any other class. The reason is that the territory covered by such location has been severed from the public domain and has become private property which is no longer open to a new appropriation."

Our construction of section 2323 is that a tunnel site can only embrace unappropriated public domain, and that under it no rights are conferred to extend a tunnel through previous valid, subsisting locations. From the record before us, appellant had no right to invade the premises of appellee, through its tunnel, and in the absence of any proof to the contrary, the presumption attaches that all veins discovered in that part of its tunnel under appellee's claims belong to the latter (*Wakeman v. Norton*, 24 Colo. 192, 49 Pac. 283), and the judgment of the court, that appellee was the owner of these veins and enjoining appellant from further extending its tunnel into, or using that portion of it under the claims of appellee, is correct.

The final question passed upon by the trial court, under the stipulation, relates to the offer of appellant to prove that at the time of the location of its Ithica tunnel site no ore had been discovered in the Monarch and Mammoth Pearl. This offer was denied. At the time the tunnel site was located and work commenced thereon, receiver's receipts had been obtained for these claims, upon which patents subsequently issued. These evidences of title took effect by relation as of date of the location of the respective claims: ²⁹ *Lindley on Mines*, sec. 783. As against a collateral attack, the action of the land department in issuing such patents conclusively settled that all steps necessary to constitute a valid location of these mining claims had been taken, which included the discovery of mineral. This question has been so frequently decided that we do not deem it necessary to discuss it: *Lindley on Mines*, sec. 777; *Davis v. Weibbold*, 139 U. S. 507, 11 Sup. Ct. Rep. 628; *Poire v. Wells*, 6 Colo. 406; *Justice Mining Co. v. Lee*, 21 Colo. 260, 52 Am. St. Rep. 216, 40 Pac. 444; *Smelting Co. v. Kemp*, 104 U. S. 636; *Steele v. Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. Rep. 389. It is contended on behalf of appellant that this principle is not applicable as between tunnel site and lode locations, because its rights were not involved in the patent proceedings. As to inchoate rights which attach to a tunnel location, this may be true, but it had none unless it successfully attacked the title of appellee in apt time, for the location of appellee's claims was prior to the location of the tunnel site. At the time of that location receiver's receipt had issued upon the Mammoth Pearl and Monarch. We cannot understand how, upon any possible theory, the rule announced is not applicable as between a tunnel site location over a prior lode location upon which a

patent has already issued. So long as the title to the claims of appellee was only evidenced by receiver's receipt, it was still subject to an attack in a way; but when patent finally issued upon these claims, it conclusively settled, as against the junior location of appellant's tunnel site, that all steps necessary to constitute a valid location of appellee's claims had been taken.

Errors are assigned upon the action of the court below in denying appellant's petition to remove the cause to the circuit court of the United States for the district of Colorado. No argument is made on this assignment, and we therefore decline to consider or pass upon it.

A further error assigned and argued by appellant is that the court erred in overruling its motion for leave to develop the blind veins in its tunnel within the lines of appellee's claims for the purpose of establishing their character. Its ³⁰ acts in attempting to initiate title to these veins was a trespass which it was not entitled to continue under any leave of court.

This disposes of all the questions argued, and, finding no error in the record, the judgment of the district court is affirmed.

What Cross or Intersecting Lodes are Included in Mineral Patents, and What Rights in Such Lodes.*

Cross or Intersecting Veins.—The determination of the rights of locators in cross or intersecting veins of mineral bearing rock turns upon the construction of sections 2322 and 2336 of the United States Revised Statutes. By the terms of section 2322, the locator of a mining claim is granted the exclusive right of possession and enjoyment of the surface included within the lines of his location, and of all veins throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically, although such veins so far depart from a perpendicular in their course downward, as to extend outside the vertical side lines of such surface locations. This section clearly gives to a locator all veins apexing within the boundaries of his claim. The extent of the grant given by this section was well stated in *Del Monte Min. Co. v. Last Chance Min. Co.*, 171 U. S. 55, 18 Sup. Ct. Rep. 895: "Every vein whose apex is within the vertical limits of his surface lines passed to him by virtue of his location. He is not limited to only those which extend from one end line to another, or from one side line to another, or from one line of any kind to another; but he is entitled to every vein whose top or apex lies within his surface lines."

Section 2336 reads as follows: "Where two or more veins intersect or cross each other, priority of title shall govern, and such prior

*REFERENCE TO MONOGRAPHIC NOTES.

Patents for mineral lands, what included therein—Extralateral rights: 58 Am. St. Rep. 263-280.

location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection."

Prior to the decision in the principal case, it had become, apparently, the settled law of Colorado that section 2336 was in direct conflict with section 2322, the grant to a prior locator under section 2322 not including cross-veins, and that the locator of a cross-vein under section 2336 had both the right of way through the first vein and all the ore within the lines of the prior claim crossed, except at the precise point of intersection. *Branagan v. Dulaney*, 8 Colo. 408, 8 Pac. 669, which established this rule, was followed by later cases both in the state courts and in the United States courts sitting in Colorado: See these cases collected in the monographic note in 58 Am. St. Rep. 275-277. Under this former Colorado rule, the "space of intersection" was held to mean the intersection of veins or lodes, and not the intersection of claims, and was held to include veins which intersect on their strike within the conflicting limits of two locations, as well as veins which intersect on their dip. On the other hand, the courts of California and Arizona harmonized these two sections of the statute, and gave full effect to section 2322, by holding that a prior locator had a right to all veins which apexed within the boundaries of his claim, including an intersecting or cross-vein, and that a junior locator of such cross-vein had no right whatever to any of the mineral within the boundaries of the prior location, nothing being granted to him by section 2336, but a right of way through the space of intersection for the convenient working of his mine: See *Wilhelm v. Silvester*, 101 Cal. 358, 35 Pac. 997; *Waterville Min. Co. v. Leach* (Ariz.), 33 Pac. 418. These cases also hold that by "space of intersection" is meant the intersection of veins, and not the intersection of claims, and that section 2336 does not apply to veins or lodes which intersect upon their strike within the conflicting limits of claims located since the mining act of 1872, but applies solely to veins which cross or intersect upon their dip.

A diagram illustrating the difference between the California doctrine and the early rule announced by the Colorado cases, will be found in the monographic note in 58 Am. St. Rep. 276.

The principal case overrules the early Colorado cases, and gives a rule differing in part from the one laid down in the California and Arizona cases. It agrees in general with the conclusion reached in the latter cases, and is in harmony with their doctrine to this extent, that it reserves to a prior locator all rights in the veins and lodes which apex within the boundaries of his claim, whether they are cross or intersecting veins, or otherwise, and denies to a junior locator on a cross-vein any right to the mineral therein,

within the boundaries of the prior location. Upon this one point, then, the authorities are harmonious, and to this extent the construction of sections 2322 and 2336 may be considered as finally settled, because the principal case was affirmed in this particular by the supreme court of the United States in *Calhoun etc. Min. Co. v. Ajax etc. Min. Co.*, 182 U. S. 499, 21 Sup. Ct. Rep. 885. The doctrine of the principal case differs from the California rule, however, in this respect, that the former construes the term "space of intersection," as used in section 2336, in determining the ownership of ore within such space, to mean both the intersection of veins and the intersection of conflicting claims according to the facts in each particular case, and that section 2336 applies to locations made under the act of 1872, and refers to the crossing of veins either upon their strike or dip.

The practical effect of the differences between the California and the new Colorado rules is very material. Under the former a junior locator under section 2336 seemingly acquires no right of way across a senior location, if the veins cross on their strike within the conflicting limits of the locations, since this section does not apply to such veins, and the "space of intersection" refers solely to the intersection of the veins. While, under the doctrine of the principal case, a junior location, while acquiring no right to any of the ore within the boundaries of the senior claim, would have a right of way across the senior location for the convenient working of his mine. The principal case, in criticising the California and Arizona rule, points out that the construction placed upon section 2336 "necessarily deprived a junior location, made under the act of 1872, of the right of way across a senior location, if the former crossed the latter." To the same effect is Morrison's *Mining Rights*, ninth edition, page 115, where, in discussing the meaning of the term "space of intersection," it is said: "If the cross-lode have the right of crossing at the point of actual vein crossing only, how is it to be worked across the ground between the side line and the space of actual vein intersection? Of what avail would such right of crossing be to those owning no easement or estate in such intervening ground? It is clear, then, that to make the act have a just and sensible meaning, the 'space of intersection' refers to the whole distance from side line to side line." This construction of section 2336 has the merit of preserving to a junior claimant a substantial and valuable right, and at the same time does not deprive a senior locator of any ore to which he is entitled, though such a construction is characterized in *Waterville Min. Co. v. Leach* (Ariz.), 33 Pac. 418, as "the grossest brutality of statutory construction."

As previously stated, the principal case was affirmed upon appeal to the United States supreme court, in *Calhoun etc. Min. Co. v. Ajax etc. Min. Co.*, 182 U. S. 499, 21 Sup. Ct. Rep. 885. All the questions raised and passed upon by the supreme court of Colorado, however, were not determined upon appeal. So far as concerned the rights of a junior claimant to the ore con-

tained in its vein which crossed the lode of a senior locator, within the surface boundaries and across the claim of the senior locator, the case is authority for the rule that the junior claimant is entitled to none of the ore within the senior location. As respects the issues in this case, sections 2322 and 2336 were held not to conflict at all, the latter section simply supplementing the former and imposing a servitude upon the senior location, but not otherwise affecting the exclusive rights given it by section 2322. The court, however, declined to define the precise meaning of the term "space of intersection," or to declare the extent of the right of way given to a junior location, whether such right of way was only through the space of intersection of the veins, as is held by the supreme courts of California and Arizona, or through the space of intersection of the claims, as is declared by the principal case.

Veins Uniting.—The latter part of section 2336 provides that "where two or more veins unite the oldest or prior location shall take the vein below the point of union, including all the space of intersection." The word "below" in this section was held not to mean "beyond," in *Lee v. Stahl*, 13 Colo. 174, 22 Pac. 436; hence the section was deemed to apply to veins which unite on their dip, but not to veins which unite on their strike. A similar construction is at least suggested by the court in *Wilhelm v. Silvester*, 101 Cal. 358, 35 Pac. 997. An interesting situation under this section arose in *Little Josephine Min. Co. v. Fullerton*, 58 Fed. 521, where the plaintiff was the owner of two mining claims, the veins of which united below the surface, and at a much greater depth met the vein of the defendant's claim, which claim had been located long after the earlier of the plaintiff's claims. The court held it to be wholly immaterial whether the defendant's location was prior to the plaintiff's junior location or not, since upon the union of the plaintiff's veins his senior location took the entire vein, and the title to the vein below the point of union related back to the time of such senior location, and hence, where the plaintiff's vein united with the defendant's, the plaintiff's location, being the oldest, was entitled to the entire vein below the point of union including all the space of intersection. In *Roxanna Gold Min. etc. Co. v. Cone*, 100 Fed. 168, where two veins, whose apices were in different claims, united in their dip outside of such claims and within the perpendicular extension of the side lines of another claim, it was held that the owner of this last claim had no interest in either vein, and therefore could not contest as to the rights in the vein beyond the point of union. In an action between two adjoining claims, the veins of which united below the surface, to determine as to who was entitled to the vein below the point of union, it was held that a location must be considered as having been made at least as early as the date of its patent: *Champion Min. Co. v. Consolidated etc. Min. Co.*, 75 Cal. 78, 16 Pac. 513.

BREWER v. GORDON.

[27 Colo. 111, 59 Pac. 404.]

VENUE OF CIVIL ACTION—RESIDENCE OF DEFENDANT—INDEMNITY BOND.—An action brought by a sheriff upon an indemnity bond, where there is no provision that the contract of indemnity shall be performed in any particular county, and the defendants are not served in the county of the plaintiff's residence, must be tried in the county of the defendants' residence, under a statute providing that an action shall be tried in the county where the defendants reside.

VENUE OF ACTION—CONTRACTS.—THE COUNTY where a contract is made does not control the county where the action shall be tried, unless the contract is to be performed in such county.

Charles D. Hayt, Thomas Macon, and Daniel Prescott, for the plaintiffs in error.

W. A. Hill, for the defendant in error.

¹¹² CAMPBELL, C. J. This action was brought in the county court of Morgan county by George A. Gordon, sheriff of that county, against the defendants upon a bond given by them to indemnify him, as sheriff, for seizing personal property under a writ of attachment. Upon issues joined there was a judgment against the defendants, from which they have appealed, and assigned and argued numerous errors.

The ruling of the court denying defendants' application for a change of the place of trial was wrong, and the judgment must be reversed for that reason. Ordinarily, we would determine the other legal propositions raised upon review, if for no other reason, for the benefit of the lower court in the event of a new trial. But after the erroneous adverse ruling upon the defendants' motion for a change of the venue, the court acted without jurisdiction in all subsequent proceedings. This, taken in connection with the fact that if a new trial is had it must be in the county court of Arapahoe county and before another judge, leads us to withhold opinion upon questions which may not again be raised.

The facts are that this bond was signed and sealed in Arapahoe county, Colorado, and approved by the sheriff in Morgan county, and, when this suit on the bond was instituted, the plaintiff lived in Morgan county, but defendants resided in, and service of summons was had upon them in, Arapahoe county. The bond is an ordinary bond of indemnity, and contains no

provision making it payable, or declaring that it is to be performed, in any particular county. Before filing their answer, the defendants claimed the privilege of being sued in the county of their residence; and upon a proper ¹¹³ showing of the facts by motion and affidavit asked that the place of trial be so changed, which application was overruled.

Section 27 of the code governs this case. It provides: "In all other cases the action shall be tried in the county in which the defendants, or any of them, may reside at the commencement of the action, or in the county where the plaintiff resides when service is made on the defendant in such county. . . . Actions upon contracts may be tried in the county in which the contract was to be performed."

In *Denver etc. R. R. Co. v. Cahill*, 8 Colo. App. 158, 45 Pac. 285, it was held that the first portion of this section is intended as a statement of a general rule, which is modified in particular instances by succeeding portions, one of which is that the action may be tried in the county in which the contract is to be performed; and that if an action upon a contract is commenced either in the county in which the contract is to be performed, or where the defendant resides, the place of trial cannot be changed upon the ground that the county designated is not the proper county. We believe this to be the proper construction of the section.

It is contended by plaintiffs in error that this contract of indemnity was made in Arapahoe county, and by defendant in error that it was made in Morgan county, the parties apparently supposing that the determination of this question settles the place of trial. We are satisfied that the bond did not become obligatory upon the indemnitors until it was approved by the sheriff, and this approval was made in Morgan county; and so, if the place where the contract was made is controlling, the county designated in the complaint is the proper place of trial: 2 Parsons on Contracts, 8th ed., secs. 582, 583.

But the place where the contract was made does not necessarily control the place where the action shall be tried. A contract may be made in one county to be performed in another county. Unless the case comes within some of the exceptions contained in the latter part of the section, the proper county in which this character of action should be ¹¹⁴ tried is the county of defendant's residence, unless defendant is served in the county where the plaintiff resides. In this bond there is no provision that the contract of indemnity is to be performed

in any particular county, and the defendants were not served in the county of plaintiff's, but in the county of defendants', residence. Therefore, it was the privilege of the defendants to have the action tried in Arapahoe county, their domicile. The fair construction of section 27 leads to this conclusion, and the only authorities we have found lend it support.

Lindheim v. Muschamp, 72 Tex. 33, 12 S. W. 125, was a suit against the sureties on a bond conditioned that a contractor should build a house in accordance with the plans and specifications embodied in a written contract. The building contract was to be performed in the county of the plaintiff's (obligee's) residence, and the sureties (obligors) lived in another county. Suit was brought against the sureties in the county where the plaintiff resided, and where the building was constructed, and it was held that it was the privilege of the defendants to have the suit brought in the county of their residence. The case did not fall within the exception to the general rule, that suit may be brought in the county where the contract was to be performed, because the bond was not specifically to be performed in any particular county.

Cohen v. Munson, 59 Tex. 236, was an action against the sureties upon an administrator's bond where administration was pending in a different county from that of the sureties' residence. The action was brought in the former county, and it was held that it should have been brought in the latter, the court saying: "To entitle a plaintiff to sue in a county other than the residence of the defendant, he must bring his case clearly within one of the exceptions of the statute. The fifth exception seems to contemplate that the instrument of writing should plainly provide that the obligation for the breach of which the defendant is sued is to be performed in a county different from that in which the defendant resides. We do ¹¹⁵ not consider that an administrator's bond, under the statute, compels the surety to answer for the defalcations of his principal in any particular county, and hence that he must be sued in the county of his residence."

The Texas code (Tex. Rev. Stats. 1895, art. 1194) is substantially the same as section 27 of our code. It is that "no person who is an inhabitant of this state shall be sued out of the county in which he has his domicile, except in the following cases: Where a person has contracted in writing to perform an obligation in any particular county, in which

case suit may be brought either in such county, or where the defendant has his domicile."

A case still more nearly in point is *McInnes v. Wallace* (Tex. Civ. App.) 44 S. W. 537. It was a suit upon a supersedeas bond, and it was held that it must be brought in the county of the obligor's residence, if the bond contains no provision to the contrary. The bond in that case was precisely like the one in the case at bar in that in neither was there a provision that the bond was to be payable, or performed, in any particular county.

The supreme court of Iowa in *Prader v. National Accident Assn.*, 107 Iowa, 431, 78 N. W. 60, in an action upon a bond given in a certiorari proceeding, held under the provisions of their code (substantially the same as ours) that the signers of the bond must be sued in the county of their residence, unless the bond itself specifically provides that the place of performance is elsewhere. So, also, to the same effect is *School Dist. v. Reichard*, 39 Iowa, 168, holding that an action on a bond, conditioned for the payment of a penalty, if the principal failed to erect a schoolhouse according to the terms of a written contract, must be brought in the county where some of the defendants reside, if the bond is silent as to the place of payment.

The argument *ab inconvenienti* of the defendant in error, that this construction of the code practically requires a sheriff to refuse a bond unless the sureties reside in his county, should not prevail against the plain language of the section. ¹¹⁶ But, as a matter of fact, he may protect himself against the necessity of bringing an action on bonds given to him in his official capacity in a county other than that of his residence by inserting therein a provision that they are to be specifically performed, or made payable, in his county, and if sureties will not consent thereto, then by accepting only of sureties who live in his county.

For this error in refusing upon defendants' application to change the place of trial, the judgment below is reversed, and the cause remanded, with instructions to the county court to enter an order directing that the cause be sent for trial to the county court of Arapahoe county.

THE VENUE OF CIVIL ACTIONS and grounds and proceedings for a change thereof are considered in the note to *Shattuck v. Myers*, 74 Am. Dec. 241-245.

DAVIDSON v. JENNINGS.

[27 Colo. 187, 60 Pac. 354.]

APPEAL BY ONE DEFENDANT FROM PART OF DECREE.—Under the statutes of Colorado an appeal from the county to the district court may be taken by one defendant alone from that portion of the decree which affects his interest, and it is not necessary that all the defendants should join in the appeal, or that the entire case should be appealed.

CONSTITUTIONAL LAW—LIENS—ATTORNEYS' FEES.—A statute giving a lien to persons who furnish merchandise or material for the development of a mine is unconstitutional, in so far as it provides that in a suit to foreclose such lien the successful lien claimant shall be allowed a reasonable attorney's fee as costs, as contravening a constitutional provision "that courts of justice shall be open to every person, . . . and that right and justice shall be administered without sale, denial, or delay."

MECHANIC'S LIEN—HOW CREATED.—A mechanic's or miner's lien is the creature of statute, and attaches only by virtue of work being done or materials furnished under a contract, express or implied, with the owner of the property upon which the lien is claimed.

MECHANIC'S LIEN—MINING CLAIM—ESTOPPEL.—A part owner of a mining claim, who has no interest in a lease under which the claim is being worked, where the rights of the parties in the property appear of record, is not estopped from claiming that persons who furnished materials for the working of the mine have no lien against his interest, by the facts that he was cognizant of the work being done and took some part in its direction, that he gave some orders for merchandise in the name of the company under which the mine was being operated, and that he failed to give notice to the lien claimants of his true relation to the property.

ESTOPPEL IN PAIS—PLEADING.—In order to raise the question of an estoppel in pais the facts constituting such estoppel must be especially pleaded.

ESTOPPEL IN PAIS—WHO MAY INVOKE.—To entitle a party to invoke the doctrine of estoppel, he must actually have been misled and induced to act to his prejudice by reason of another's conduct, he having on his part exercised due diligence to ascertain the truth.

Walcott & Vaile, W. W. Field, Thomas C. Brown, and Ernest M. Nourse, for the appellants.

Sprigg Shackelford, for the appellees.

190 GODDARD, J. 1. Appellees assign cross-error upon the overruling of their motion by the district court to dismiss the appeal to that court from the county court. The motion was based upon the ground that the appeal was taken by Davidson and Himebaugh alone, and from that part of the decree only that established the lien, the contention being that an

appeal from the county to the district court can be taken only by the united action and concurrence of all the defendants to the suit in the county court. We do not think that this position is tenable. Section 1085 of Mills' Annotated Statutes, *inter alia*, provides: "Appeals may be taken to the district court of the same county, from all final judgments and decrees of the county court, . . . by any person aggrieved by any such final judgment or decree," etc.

It will be seen that this statute provides that an appeal may be taken by any person aggrieved. Davidson and Himebaugh were affected by the judgment and decree only in so far as it established a lien against their property, and were not concerned with, or directly affected by, that portion which adjudged a personal liability against Smith, Outcalt, and Clayton. If it should be held that, as a condition to their right to have so much of the controversy as affected their rights tried *de novo* in the district court, it was essential that all the defendants in the county court should join in the appeal, or that, in case of the refusal of any to join, it was incumbent ¹⁹¹ upon Davidson and Himebaugh to appeal the entire case, thereby necessitating their giving an appeal bond to answer for the personal judgment, it is manifest that they would, in the one event, have been deprived of their right to an appeal, and in the other they would have reaped no benefit from the submission of their case to the district court, even if successful in defeating the lien. The appeal as taken in no way disturbed the personal judgment against Smith, Outcalt, and Clayton, which determined their liability; nor was there any occasion for the district court, upon the trial of the question as to whether or not a lien existed against the property of appellants, to consider the personal liability of those parties. The court was therefore correct in so deciding and refusing to dismiss the appeal.

2. Counsel for appellants contend that the judgment and decree is erroneous in that the lien decreed against the property of appellants includes, in addition to the principal and interest of the debt and the usual costs, the allowance of attorneys' fees to the respective lien claimants. These allowances were made in pursuance of section 18, chapter 117, of the Session Laws of 1893, page 325, which reads as follows: "In all suits for the foreclosure of liens provided for in this act in which the plaintiff shall obtain a judgment and decree of foreclosure against the property described in said lien, there shall be taxed as costs, in addition to the costs already provided for in such cases, a

reasonable sum as attorney fee, to be fixed by the court at the time of rendering such judgment and decree."

It will be seen that this section imposes a penalty upon the defendant for exercising, in this class of cases, the common right of making a defense, which is accorded to every other litigant in the courts, by subjecting him to the payment of the plaintiff's attorneys' fees if he is successful, without giving him (the defendant) a reciprocal right if he is victorious. As furnishing support for this character of legislation, we are referred to the following cases, wherein statutes allowing an attorney's fee to plaintiff in actions against railroad companies ¹⁹² for the killing of stock have been held to be constitutional: *Peoria etc. Ry. Co. v. Duggan*, 109 Ill. 537, 50 Am. Rep. 619; *Kansas Pac. Ry. Co. v. Mower*, 16 Kan. 573; *Perkins v. St. Louis etc. Ry. Co.*, 103 Mo. 52, 15 S. W. 320; *Burlington etc. Ry. Co. v. Dey*, 82 Iowa, 312, 31 Am. St. Rep. 477, 48 N. W. 98.

An examination of these cases discloses that the statutes there under consideration required the railroad company to fence its right of way, and provided penalties for the nonperformance of this statutory duty—among them, an attorney's fee; but no such reason underlies the legislation in question. The attorney's fee allowed by the foregoing provisions of our statute is not in the nature of a penalty for the violation of any statutory duty, but a punishment for the failure to pay the claim of the lienor, and cannot be sustained upon the principle announced in those cases. Its validity, therefore, depends upon whether it violates any provision of our constitution. Section 6 of our bill of rights enacts: "That courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property, or character; and that right and justice should be administered without sale, denial, or delay." In *Durke v. Janesville*, 28 Wis. 464, 9 Am. Rep. 500, an act that exempted the city of Janesville from the payment of costs in any action brought against it to set aside any assessment or tax deed, or to prevent the collection of taxes in said city, was held to conflict with section 9, article 1, of the constitution of Wisconsin, which was substantially like the foregoing section of our bill of rights. Chief Justice Dixon, in discussing the construction and effect to be given to that provision, said: "It is obvious there can be no certain remedy in the laws, where the legislature may prescribe one rule for one suitor or class of suitors in the courts, and another for all others under like circumstances, or may discriminate between par-

ties to the same suit, giving one most unjust pecuniary advantage over the other. Parties thus discriminated against would not obtain justice freely, and without being obliged to purchase it. To the extent of such discrimination they would be obliged ¹⁹³ to buy justice and pay for it, thus making it a matter of purchase to those who could afford to pay, contrary to the letter and spirit of this provision. Certainty of remedy implies uniformity of remedy and equality of rights and privileges in all things respecting it, which can only be obtained by general laws, equally binding upon every member of the community. The language denotes that there can be but one remedy for all similar cases, which must operate upon all persons or parties alike, and be equally free and favorable to all."

In *South & North Ala. Ry. Co. v. Morris*, 65 Ala. 193, a statute which imposed upon an unsuccessful appellant a reasonable attorney fee, incurred by reason of taking an appeal from a decision rendered by a justice of the peace in a suit against railroad companies for damages to livestock, notwithstanding it gave the same right to both parties, was held to be in conflict with the fourteenth amendment to the constitution of the United States and section 14 of their bill of rights, which is identical with section 6 of ours. It is there said: "The clear legal effect of these provisions is to place all persons, natural and corporate, as near as practicable, upon a basis of equality in the enforcement and defense of their rights in courts of justice in this state, except so far as may be otherwise provided in the constitution. This right, though subject to legislative regulation, cannot be impaired or destroyed under the guise or device of being regulated. Justice cannot be sold, or denied, by the exaction of a pecuniary consideration for its enjoyment from one, when it is given freely and open-handed to another, without money and without price. Nor can it be permitted that litigants shall be debarred from the free exercise of this constitutional right by the imposition of arbitrary, unjust, and odious discriminations, perpetrated under color of establishing peculiar rules for a particular occupation. Unequal, partial, and discriminatory legislation, which secures this right to some favored class or classes, and denies it to others, who are thus excluded from that equal protection designed to be secured by the general law of the land, ¹⁹⁴ is in clear and manifest opposition to the letter and the spirit of the foregoing constitutional provisions."

In *Chicago etc. Ry. Co. v. Moss*, 60 Miss. 641, a similar statute was adjudged unconstitutional, the court saying: "The right of appeal cannot be fettered and clogged with reference to the parties litigant or the attitude they occupy as plaintiff or defendant. All litigants, whether plaintiff or defendant, should be regarded with equal favor by the law, and before the tribunals for administering it, and should have the same right to appeal with others similarly situated. All must have the equal protection of the law, and its instrumentalities. The same rule must exist for all in the same circumstances."

In *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. Rep. 255, an act of the legislature of Texas, which provided that any person having a valid bona fide claim for personal services, or for damages, overcharges on freight or claims for stock killed or injured by the trains of any railway company, that did not exceed fifty dollars, might present the same for payment by filing it with the station agent of such corporation in any county where suit might be instituted; and if, after the expiration of thirty days after such presentation, such claim had not been paid or satisfied, he might immediately institute suit thereon in proper court; and if he should obtain judgment for the full amount of his claim, he should be entitled to recover the amount of such claim and all costs, and in addition thereto, a reasonable attorney fee, not to exceed ten dollars, to be assessed or awarded by the court or jury trying the issue, was held to be unconstitutional. Mr. Justice Brewer, who delivered the opinion of the court, said: "The act singles out a certain class of debtors and punishes them, when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorneys' ¹⁹⁵ fees of the successful plaintiff; if it terminates in their favor, they recover no attorneys' fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorneys' fees if wrong; they do not recover any if right, while their adversaries recover if right, and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute."

And after a thorough and exhaustive review of all the cases bearing upon the subject, he held the act to be unconstitutional because it operated to deprive the railway companies of property without due process of law, and denied to them the equal protection of the law, in that it singled them out of all citizens and corporations and required them to pay, in certain cases, attorneys' fees to parties successfully suing them, while it gives to them no like or corresponding benefit. To the same effect are *Joliffe v. Brown*, 14 Wash. 155, 53 Am. St. Rep. 868, 44 Pac. 149, *Coal Co. v. Rosser*, 53 Ohio St. 12, 53 Am. St. Rep. 622, 41 N. E. 263, *State v. Fire Creek Coal etc. Co.*, 33 W. Va. 188, 25 Am. St. Rep. 891, 10 S. E. 288, and others that might be cited.

In but few of the states are statutes allowing attorneys' fees in this class of cases to be found. In California such legislation has been upheld by the supreme court, but in none of the cases has its constitutionality been presented, discussed, or determined. In the following cases its constitutionality was directly challenged and passed upon. In *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104, 43 N. W. 1006, a statute which allowed five dollars attorneys' fees as part of plaintiff's costs in a log lien suit was held to be illegal and unauthorized for the reasons stated in *Wilder v. Chicago etc. Ry. Co.*, 70 Mich. 382, 38 N. W. 289; *Schut v. Chicago etc. Ry. Co.*, 70 Mich. 433, 38 N. W. 291; *Lafferty v. Chicago etc. Ry. Co.*, 71 Mich. 35, 38 N. W. 660. In *Wilder v. Chicago etc. Ry. Co.*, 70 Mich. 382, 38 N. W. 289, the court, in discussing the question, says: "This inequality and injustice cannot be sustained upon ¹⁹⁶ any principle known to the law. It is repugnant to our form of government, and out of harmony with the genius of our free institutions. The legislature cannot give to one party in litigation such privileges as will arm him with special and important pecuniary advantages over his antagonist."

In *Randolph v. Builders' etc. Supply Co.*, 106 Ala. 501, 17 South. 721, the provision allowing attorneys' fees was held to be in violation of section 14 of their bill of rights, which, as above stated, is identical with section 6 of ours, "in that it allows a fee to the plaintiff's attorney for prosecuting his suit successfully, whereas a like fee is not allowed the defendant's attorney, in case the plaintiff fails in his suit, and on that account it is discriminative and class legislation."

In *Wortman v. Klienschmidt*, 12 Mont. 316, 30 Pac. 280, the constitutionality of the act was upheld by a divided court,

the majority opinion being delivered by Blake, C. J. But we think the able dissenting opinion of De Witt, justice, is better supported by reason and authority.

In *Ivall v. Willis*, 17 Wash. 645, 50 Pac. 467, a loggers' lien act which provided an attorney's fee for the person claiming the lien was upheld, the court observing that such act was clearly distinguishable from the statute under consideration in *Joliffe v. Brown*, 14 Wash. 155, 53 Am. St. Rep. 868, 44 Pac. 149, which provided for an attorney's fee to plaintiff in case of recovery against the railway company for killing stock, and which was there declared unconstitutional because it did not provide for the payment of a like fee by plaintiff in case he should be unsuccessful, for the reason that the attorney's fee provided by the latter was compensation to plaintiff for expenditures necessarily made by him in the foreclosure of his lien, and allowable upon the same principle that costs are allowed. It is difficult to see how the designation of such fee as costs obviates the objection that it confers upon the plaintiff a right that is denied to defendant, and that it is an "attempt to grant special privileges and advantages to one class of litigants at the expense, and to the detriment, of another."

Appellee lays some stress upon the fact that Mr. Justice ¹⁹⁷ Brewer, in *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. Rep. 255, mentions, in the course of his discussion, that statutes giving special protection to laborers and mechanics have been upheld; but the reasons he gives for distinguishing the legislation there under consideration from such statutes apply with equal force to our act, to wit, that it does not aim to protect laborers and mechanics alone; but its benefits are conferred upon every individual, whether rich or poor, who has a claim of the character described. It extends the benefit to materialmen, contractors, and others who do not come within the reason that justifies such legislation for the protection of laborers or mechanics. While it is true that statutes extending the right to a lien to these other classes have been upheld, yet the principle upon which they have been sustained affords no support for extending to them the benefits of the provision under consideration. We are unable to perceive any reason why, in an action to enforce their claims for merchandise or material furnished in the erection of a house or for the development of a mining claim, they should be afforded any other or greater rights than are given other merchants who furnish provision or supplies to persons for family consumption; or that their debt-

ors should not have the same right to contest the justice of their claims upon the same terms and conditions as is afforded to other debtors by the general law of the land. It is no answer to say that the debtor may avoid the imposition of this additional cost by paying his honest debts, because the very purpose of the litigation he invokes is to determine whether he owes the debt or not; and it is immaterial whether he successfully defeats the larger part of the claim; he may nevertheless be mulcted in a sum which will deprive him of any benefit from the defense which he has legitimately established. It is also equally immaterial whether he interposes a vexatious defense or makes an honest, though unsuccessful, one, or allows judgment to be taken against him by default; he is subjected to the same penalty.

We think this character of legislation is prohibited by section 198 6 of our bill of rights, and that both upon principle and authority section 18 of the lien law is unconstitutional, and that the court below erred in allowing the attorneys' fees complained of. This, however, if the only error, would not necessitate a reversal of the entire judgment, since the lien and judgment are affected only to the extent of the illegal excess.

3. The principal and controlling question presented by appellants' assignments of error is whether, under the pleadings and facts of this case, the court below erred in holding that a lien attached against Clayton's interest by reason of his connection with, and apparent interest in, the operations of the mine. A mechanic's or miner's lien is the creature of the statute, and attaches only by virtue of work being done or materials furnished under a contract, express or implied, with the owner of the property upon which the lien is claimed, and the burden of proving such contract rests upon the party asserting it; and he must ascertain for himself that the party with whom he deals holds such a relation to the work being done, and the property upon which the same is done, as will entitle him to claim a lien for the work or material which he furnishes: *Rico etc. Co. v. Musgrave*, 14 Colo. 79, 23 Pac. 458; *Tritch v. Norton*, 10 Colo. 337, 15 Pac. 680; *Henry etc. Co. v. Fisherick*, 37 Neb. 207, 55 N. W. 643; *Brown v. Cowan*, 110 Pa. St. 588, 1 Atl. 520.

In this case there is an entire absence of evidence tending to show that the mine was being worked under any contract or arrangement by virtue of which Clayton was in any way made liable for the labor performed or merchandise furnished, or that there existed any contract which directly or indirectly

obligated him to pay for the same, or that the lien claimants or their assignors performed the work or delivered the merchandise sued for, relying upon his personal credit. But, on the other hand, it is clearly established that the property was being operated by Smith and Outcalt, under a lease in which Clayton had no interest, and the labor was performed and the merchandise furnished exclusively for ¹⁹⁹ their use and benefit. This lease and its several assignments were of record in Gunnison county prior to and during the time the indebtedness herein sued for accrued, and were notice to all parties concerned that the same had been transferred and then stood of record in the name of Smith and Spinney, and the lien claimants or their assignors, had they taken the precaution to inquire, could have readily ascertained that Spinney's interest had passed to Outcalt, and that at the time of the transactions mentioned in the complaint Smith and Outcalt, in the contemplation of the mechanic's lien statute, were the only "owners" of the property whose interest therein could be subjected to lien for their claims. Under these circumstances it is clear that no lien accrued against Clayton's interest in the mine in their favor by virtue of any contract relation that they directly or indirectly held to him. This was evidently the conclusion reached by the court below, since it predicated the liability of Clayton and the right to a lien against his interest in the property solely upon the ground that he was cognizant of the work being done, and to some extent took part in its direction, and having in some instances given orders for merchandise in the name of the company under which it was being operated, and failing to notify the parties dealing with the company of his true relation thereto, he is now estopped from claiming that such persons have no lien against his interest. We do not think that, under the circumstances of this case, such conclusion is justified. As we have seen, it was the duty of these lien claimants to ascertain with whom they were dealing, and for whose use and benefit they were performing labor and furnishing material. And certainly, in the then condition of the record, Clayton had a right to presume that they had knowledge of the true state of the title, and of the facts they could have ascertained by such inquiry as was suggested by the record. "Where a party's rights in property sufficiently appear of record, mere silence on his part is no violation of duty": ²⁰⁰ 7 Am. & Eng. Ency. of Law, 1st ed., 13, note "Silence," and authorities there cited.

But aside from this, the question of estoppel was neither raised by the pleadings nor supported by the evidence. That the facts constituting an estoppel in pais must be especially pleaded is well settled: *De Votie v. McGerr*, 15 Colo. 467, 22 Am. St. Rep. 426, 24 Pac. 923; *Gaynor v. Clements*, 16 Colo. 209, 26 Pac. 324; *Prewitt v. Lambert*, 19 Colo. 7, 34 Pac. 684.

The complaint avers that Smith, Outcalt, and Clayton made and entered into an agreement with the parties performing labor upon the Vulcan mine, and that the goods, wares, and merchandise were supplied to defendants to be used for the working, preservation, and development of said Vulcan mine, thus predicated their right to relief as against Clayton upon direct agreements between him and the persons for whose labor and material the liens are claimed. The answer of these appellants denied these allegations and any and all indebtedness on the part of Clayton. The parties went to trial upon these issues. The testimony wholly failing to show a contract of employment by Clayton, appellees undertook to show such a participation in the business as would raise an implied contract on his part. Not only was this testimony inadmissible under the issues formed by the pleadings, but was, we think, clearly insufficient to raise any implied assumpsit. It at most disclosed acts on his part within the scope of his employment, and wholly fails to show that in any instance the parties performed the labor or furnished the materials, relying upon his liability as a party in interest, or upon his personal credit, or that they were induced so to do by his acts or apparent connection with the business. To entitle a party to invoke the doctrine of estoppel, he must actually have been misled and induced to act to his prejudice by reason of another's conduct, he having on his part exercised due diligence to ascertain the truth. In *Moore v. Bowman*, 47 N. H. 494, the doctrine is thus concisely stated: "To have this effect, however, the defendant must actually have been misled by the plaintiff's conduct, and induced ²⁰¹ thereby to change his position. If he is not so misled, . . . and with a reasonable use of means within his reach he might have ascertained the fact, he could not set up an estoppel. The truth is, the party setting up an estoppel is himself bound to the exercise of good faith and due diligence to ascertain the truth": *Douglas v. Craig*, 13 S. C. 371; 2 *Herman on Estoppel*, sec. 969.

If it can be held that a lien can be created against the interest of an owner of property in this state, in the absence of

any contract on his part, by reason of his conduct, it is manifest that the facts disclosed by this record are insufficient to work such a result.

We are, therefore, of the opinion that, in the circumstances of this case, no lien was created against Clayton's interest in the mine, and the court below erred in adjudging a lien against such interest. For the foregoing reasons, the decree of the court below is reversed, and the cause remanded, with directions to enter judgment in favor of appellants.

Mr. Justice Gabbert not participating.

ATTORNEYS' FEES.—THE CONSTITUTIONALITY OF STATUTES allowing attorneys' fees in the foreclosure of mechanics' liens is discussed in the monographic note to *Dell v. Marvin*, 79 Am. St. Rep. 180, 181.

TO CONSTITUTE AN ESTOPPEL IN PAIS, there must be a false representation or concealment of facts, made to a party ignorant of their truth or falsity, and made with an intent that the party should act upon them, and he must have so acted: Note to *Prieve v. Wisconsin State Land etc. Co.*, 74 Am. St. Rep. 909.

ESTOPPELS IN PAIS MUST BE PLEADED specially to be available: *Cockrill v. Hutchinson*, 135 Mo. 67, 58 Am. St. Rep. 564, 36 S. W. 375. See, also, *State v. East Fifth St. Ry. Co.*, 140 Mo. 539, 62 Am. St. Rep. 742, 40 S. W. 955.

INTERNATIONAL TRUST CO. v. UNITED COAL CO.

[27 Colo. 246. 60 Pac. 621.]

RECEIVERS—CORPORATIONS.—A receiver should not be appointed in an action by a simple contract creditor against a debtor corporation to prevent such corporation from fraudulently disposing of its property, and putting beyond its power the ability to respond to a judgment sought to be obtained on an unsecured debt.

RECEIVERS—RAILROADS—INDEBTEDNESS INCURRED—PRIOR LIENS—MORTGAGE.—Pending a suit to foreclose a mortgage executed by a railroad company, the road may be operated by a receiver, and the expenses of the operation incurred by him may be made a first lien upon the income, and if that is not sufficient for the purpose, then upon the corpus of the property, superior to that of the prior mortgage.

RECEIVERS—INSOLVENT CORPORATION—OPERATING EXPENSES—LIENS.—In administering the affairs of an ordinary insolvent private business corporation for which a receiver has been appointed, a court of equity has no power to authorize the receiver to incur indebtedness for carrying on the business, and to make the same a first and paramount lien upon the corpus of the property superior to that of prior lienholders without their consent.

RECEIVERS — PRIVATE CORPORATIONS—INDEBTEDNESS—PARAMOUNT LIEN.—While the business of a private corporation may be temporarily carried on by a receiver, the obligations that he may incur that may be made a paramount lien on the corpus of the property are limited to such obligations as have been contracted for, and as relate to, the preservation of the status of the property at the time of the appointment of the receiver.

RECEIVERS — PRIVATE CORPORATIONS — LIENS—ESTOPPEL.—When a receiver of a private corporation has been appointed in a suit by an unsecured creditor, a trustee and bondholders secured by mortgage who are not made parties to the suit, but who know of the receivership and the manner of conducting the business and make no objection thereto, and who do not bring a suit to foreclose their mortgage, are not estopped from objecting that the receiver's certificates issued for operating expenses shall be made a lien on the property of the corporation prior to their mortgage, when the holders of such certificates had notice of the rights of the trustee and bondholders, and were not misled by any conduct of the trustee or of the bondholders, and whenever there was an occasion they all objected to any action that in any wise impaired their prior lien.

TRUSTEES—WHEN REPRESENT BONDHOLDERS.—In a suit by a trustee of a mortgage to foreclose the same, or when he is in court as a party defending the validity of bonds or protecting the interests of his beneficiaries, or when acting within the scope of the power as defined by the trust instrument, the trustee represents the bondholders, but in a suit by an unsecured creditor, to which the trustee has been improperly made a party, the trustee cannot bind the bondholders by any action he may take.

John S. McBeth, for the appellant.

William Teller, Hodges, Wilson & Hodges, F. A. Williams, G. Q. Richmond, and Charles E. Gast, for the appellees.

253 CAMPBELL, C. J. The immediate and principal question for our determination is whether the lien of the receivers' certificates is senior or junior to the lien of the prior recorded mortgage. The discussion of that question, however, will be simplified by considering briefly the nature of the action brought by the German National Bank.

Though the bank held as collateral security for its loan to the United Coal Company some first mortgage bonds of the latter, the action which it instituted was not for the purpose of foreclosing the mortgage, or protecting its interests as a bondholder. Fairly considered, the principal, and, in fact, the sole, object of the action was to conserve, for the benefit of an unsecured creditor seeking a judgment, the assets of his debtor, if any, exclusive of those covered by the debtor's prior mortgage. The plaintiff in that case, therefore, cannot be considered in any sense as a representative of the bondholders, or as having brought the suit for the purpose of pro-

protecting their interests. It described itself as a pledgee of bonds only to acquire an additional standing in court, to be heard upon a complaint that the assets of the company that issued the bonds, in excess of the amount of the bonded debt, were about to be squandered, and, for that reason, a receiver should be appointed to conserve them for a creditor whose debt could be made only out of such surplus.

The appointment of a receiver at the instance of the bank is, perhaps, not directly, or necessarily, before us upon this review, but lest our silence concerning it might be misconstrued as an approval of the court's action, we take this occasion to declare that a receiver should not have been appointed; and while the court, in making the appointment, may not have been without jurisdiction, still the case was not one which called for the exercise of that power. As already indicated, instead of being in the nature of a suit to foreclose a lien, it was, on the contrary, avowedly an action²⁵⁴ by a simple contract creditor to prevent a debtor from fraudulently disposing of its property, and putting beyond its power the ability to respond to a judgment sought to be obtained on an unsecured note.

In a series of cases decided by the supreme court of the United States, beginning with *Wallace v. Loomis*, 97 U. S. 146, and including among many other cases that might be cited *Fosdick v. Schall*, 99 U. S. 235, *Barton v. Barbour*, 104 U. S. 126, *Miltenberger v. Logansport Ry. Co.*, 106 U. S. 286, 1 Sup. Ct. Rep. 140, *Union Trust Co. v. Souther*, 107 U. S. 591, 2 Sup. Ct. Rep. 295, *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. Rep. 675, *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. Rep. 809, *Wood v. Trust etc. Co.*, 128 U. S. 416, 421, 9 Sup. Ct. Rep. 131, *Kneeland v. American Loan etc. Co.*, 136 U. S. 89, 10 Sup. Ct. Rep. 950, and *Morgans etc. Co. v. Texas Cent. R. R. Co.*, 137 U. S. 171, 11 Sup. Ct. Rep. 61, in which receivers of insolvent railway companies have been appointed, the doctrine has firmly established that, pending a suit to foreclose a mortgage executed by a railroad company, the road may be operated by a receiver, and the expenses of the operation incurred by him, as well as certain kinds of indebtedness theretofore contracted by the company, may be made a first lien upon the income, and if that is not sufficient for the purpose, then upon the corpus of the property, superior to that of the prior mortgage.

Counsel representing the holders of the receivers' certificates in this case invoke this doctrine, and seek to extend it to certifi-

cates issued by a receiver under the order of the court in administering upon an insolvent private corporation. In passing, it may be observed that in every case in which the doctrine has been applied the suit was one by the trustee, either to foreclose a mortgage or to defend or protect as against a stranger seeking to enforce or destroy the trust the rights of the bondholders. Our attention has been called to but one case in which this doctrine has been extended to an ordinary insolvent private corporation, and that is the case of *Ellis v. Vernon etc. Water Co.*, 86 Tex. 109, 23 S. W. 858. The learned judge delivering the opinion states that he can perceive no difference in principle, so far as the applicability of the doctrine is concerned ²⁵⁵ between railroads and ordinary private corporations, and cites in support of his conclusion *Appeal of Neafie (Pa.)*, 12 Atl. 271. But an examination of the facts of that case shows that the parties then before the court, including creditors, consented to the order displacing their prior lien. This being true, it is not in point. After having decided the case on general equity principles, the Texas court proceeds to demonstrate that, under their statute in force at the time the case was decided and the rights of the parties accrued, the expenses of the receiver which were evidenced by the receiver's certificates were expressly made a prior lien to that of a recorded mortgage. So the case cannot be considered as authority for the doctrine contended for here, and the remarks of the court to that effect were clearly obiter. Moreover, the case is unlike the case at bar in other particulars, and it might be that the court, in its decision, was influenced by the fact that the interests of the community, which derived its domestic water supply from the property, demanded a continuance of its operation by a receiver.

We are referred to some late cases by the supreme court of the United States which are said to recognize the extension of the rule, as made by the district court. *Cake v. Mohun*, 164 U. S. 311, 17 Sup. Ct. Rep. 100, is cited as one holding that a court of equity has power, through its receiver, to carry on a purely private business, and in doing so to authorize the contracting of indebtedness which it may make superior to a mortgage prior in time. In that case, where a receiver was appointed to conduct a hotel, no question was raised as to the power of the court in the premises. The court authorized the receiver to borrow money to pay expenses and to issue his certificates, but the court did not say that the lien thereof should be paramount and superior to a prior mortgage without the con-

sent of the mortgagees. Indeed, the prior lienholders were not before the court, and yet the decree of foreclosure was made subject to the prior mortgage. The purchasers at the receiver's sale were the ones complaining, but in order to get possession of the property they had given to the receiver an ²⁵⁶ undertaking, and the court expressly said that the purchasers (the appellants) could not object to the order of the court adjudicating the receiver's certificates superior to their claim (of holding the property free of their lien), because in their undertaking they agreed to pay such sums of money as the court should thereafter find to be due the receiver on account of his expenditures in conducting the hotel. In other respects, not necessary to specify, the case is quite different from the one at bar.

Kneeland v. Bass Foundry etc. Works, 140 U. S. 592, 11 Sup. Ct. Rep. 857, related to a receivership of a railroad property, and is not authority for the contention of appellees. Fidelity Ins. etc. Co. v. Roanoke Iron Co., 68 Fed. 623, cited in support of appellees' position, is not in point, for the court there held that the power contended for did not exist unless it was necessary to issue the certificates to preserve the existence of the property and the franchise in the condition in which they were when the receiver was appointed. Nor are Knickerbocker v. McKindley Coal Co., 172 Ill. 535, 64 Am. St. Rep. 54, 50 N. E. 330, nor Thornton v. Highland Ave. etc. R. R. Co., 94 Ala. 353, 10 South. 442, when fairly considered, in point. In the Illinois case the court held that the consent of the appellant, who represented the prior lienholders, was given to the incurring of the indebtedness.

The supreme court of the United States has not directly limited the doctrine to railroad cases, but in some of its later decisions there is a clear intimation that it should be thus restricted, and even in railroad cases the power should be exercised sparingly and with great caution. In Wood v. Guarantee Trust etc. Co., 128 U. S. 416, 9 Sup. Ct. Rep. 131, the court said: "The doctrine of Fosdick v. Schall, 99 U. S. 235, has never yet been applied in any case, except that of a railroad. The case lays great emphasis on the consideration that a railroad is a peculiar property, of a public nature, and discharging a great public work. There is a broad distinction between such a case and that of a purely private concern."

In Kneeland v. American Loan etc. Co., 136 U. S. 89, 10 Sup. Ct. Rep. 950, the court in condemning the practice of appoint-

ing receivers and ²⁵⁷ attempting to exercise absolute control over the property, uses this language: "It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

In *Farmers' Loan etc. Co. v. Grape Creek Coal Co.*, 50 Fed. 481, the court expressly holds that the doctrine which the supreme court of the United States has laid down in railroad receivership cases has no application to private concerns, stating: "This has been done, however, on grounds not applicable to mortgages executed by private corporations." The entire opinion is instructive upon the question before us. In *Raht v. Attrill*, 106 N. Y. 423, 60 Am. Rep. 456, 13 N. E. 282, a like conclusion was reached in an exhaustive and learned opinion by Mr. Justice Andrews. In *Bound v. South Carolina Ry. Co.*, 50 Fed. 312, there was an unsuccessful attempt to apply the doctrine of *Fosdick v. Schall*, 99 U. S. 235, to the case of a navigation company which had passed under the control of a receiver. To the same effect, see *Laughlin v. United States Rolling Stock Co.*, 64 Fed. 25; *Fidelity Ins. Co. v. Roanoke Iron Co.*, 68 Fed. 623; *Doe v. Northwestern Coal etc. Co.*, 78 Fed. 62.

Hanna v. State Trust Co., 70 Fed. 2, went up from the circuit court of the United States for the district of Colorado. It was a suit by the second mortgagee to foreclose a mortgage on real estate, in which the prior mortgagees were parties, and in which a receiver was appointed, who applied for leave to issue receiver's certificates to be made a prior lien upon the lands for the purpose of raising money to pay taxes, carry out contracts with purchasers, and continue the business ²⁵⁸ of the company, which was that of irrigating, improving and colonizing arid lands. In a trenchant opinion by Caldwell, J., it was held that the certificates might be issued to pay taxes, but that the court would not, against the objection of the first mortgagees, issue certificates to displace their liens for the other purposes suggested. This case, perhaps, goes further than some others in limiting the powers of the court in such a case, but we approve, in general, of the wholesome doctrine enunciated:

See, also, *Snively v. Loomis Coal Co.*, 69 Fed. 204; *Baltimore etc. Assn. v. Alderson*, 90 Fed. 142; *Jones on Railroad Securities*, sec. 259 et seq.

After a careful consideration of all the authorities cited, we are of opinion that, in administering the affairs of an ordinary insolvent private business corporation for which a receiver has been appointed, a court of equity has not the power to authorize the receiver to incur indebtedness for carrying on the business and to make the same a first and paramount lien upon the corpus of the property superior to that of prior lienholders without their consent. While it may, in a proper action, and with the proper parties present, through the instrumentality of a receiver carry on the business of private corporations or individuals temporarily, and incur obligations therefor that may be made a paramount lien on the corpus of the property, such obligations must have been contracted for, and must relate strictly to, the preservation of the status of the property at the time of the appointment of the receiver. We are not disposed to extend the doctrine established by the federal courts in administering upon insolvent railroad corporations to those of ordinary business corporations.

Appellees, however, insist that even if the rule which we have just laid down upon the main question in the case is right, still the decree may be upheld upon other principles. And this leads us to a consideration of the various arguments advanced in their support. There are a number of appellees represented by different counsel, not all of whom seek to uphold the decree upon the same grounds; but we shall consider ²⁵⁹ all arguments deemed worthy of notice without indicating by which counsel they are advanced.

1. We have already suggested that, had the character of the action and the presence of the proper parties warranted it, certificates in this case might have been issued for money borrowed to preserve and hold intact the property of the insolvent corporation, which might have been established as liens paramount to that of the prior mortgage had the income been insufficient to discharge them. Such, however, is not this case. While reference in some of the orders is made to the fact that the receiver is permitted to borrow money to preserve the property, it is unquestionably true that the money for which these certificates were issued was borrowed to carry on the business of mining and selling coal, and in no proper sense can it be said

that they represent, or were given for, money devoted to the preservation of the property.

2. One of the counsel urges that, under the equitable doctrine of unjust enrichment, it would be unfair for the bondholders to receive an increment to the property without accounting to those who made it. How this contention can be made is utterly beyond our comprehension. The facts abundantly show that, instead of any enrichment accruing to the property in which the bondholders were interested, directly the opposite occurred, since many thousand of tons of coal were taken from their property which, to that extent, was depreciated in value, and in the operation of mining an indebtedness was incurred over and above the profits reaching into thousands of dollars. Whatever may be the doctrine sought to be enforced, the facts of this case do not call for its application.

3. The principal ground relied upon by one of the counsel for the appellees, and which, in our judgment, is the only one worthy of serious consideration, is that, because of the conduct of the bondholders and their trustee, they are now estopped to complain. It will be observed that, in the suit by the bank, neither the trustee nor any of the bondholders was by the plaintiff made a party. Indeed, no cause of action ²⁶⁰ whatever was stated against either the trustee or the bondholders, and no relief was sought that in any wise could injuriously affect them. The subsequent order of the court, at the request of the receiver, by which the trustee was brought in, was erroneous, and cannot operate in any way to its injury or that of the cestuis que trustent. During the receivership of Brooks it appears that he filed various petitions in the court stating that an indebtedness of about eighty thousand dollars had been incurred by the United Coal Company before he was appointed receiver, mainly for labor and supplies. These creditors were clamorous for payment, and threatened seriously to interfere with the successful operation of the properties unless their claims were liquidated. The receiver, therefore, asked the permission of the court to borrow money, issue receiver's certificates therefor, and have them made a first and paramount lien upon the corpus of the property, and he gave notice to the trustee and some of the bondholders who could easily be reached of his intention to apply for this authority. The trustee and bondholders notified appeared and, while not objecting to the borrowing of money provided it was to be paid out of

the profits of the business, strenuously objected thereto if it was to be made a lien superior to theirs. The court permitted the borrowing of the money, but made the debt thus contracted subject to all prior liens, and during the entire receivership of Brooks, upon successive applications made for the borrowing of money for various purposes, the court uniformly in its numerous orders expressly made the indebtedness to be incurred subject to the prior liens.

After Mr. Bishop was appointed receiver in place of Brooks, resigned, upon his representation that the International Trust Company was a proper party, the court made it a party—which ruling was unauthorized—and ordered it brought in, and after this order was made and Bishop filed a petition asking leave to borrow money and issue receiver's certificates to be a first lien, a notice of the application was served upon the International Trust Company, and it appeared by counsel and objected thereto; but the court, notwithstanding this objection, ²⁶¹ permitted certificates to be issued and made them a lien upon the corpus of the property superior to that of the mortgage.

This was the first action upon the part of the court, and constituted the only order antecedent to the final decree in which the prior security was injuriously affected. This money which Bishop desired to borrow was applied in liquidating indebtedness incurred by his predecessor Brooks, and which, in large part, resulted from the payment by Brooks of the eighty thousand dollars due to miners and others before the bank suit was started; and at the time Brooks obtained permission to raise the money the order granting it specified that prior liens were not to be impaired.

After the trust company brought its suit to foreclose the mortgage, and upon its consolidation with the bank suit, the court expressly reserved for future consideration the relative ranking of the indebtedness incurred by the two receivers with that represented by the mortgage bonds. It is said by counsel that the trust company and some of the bondholders not only knew that a receiver had been appointed in the bank suit, but that he was conducting the business of the United Coal Company in the ordinary way, and made no objection to it; and that, therefore, in the absence of an objection, or upon the failure of the trustee to bring a suit to foreclose the mortgage, it and its cestuis que trustent must now be held estopped to question the order of the court which subordinated their lien

to that of innocent parties who advanced money, performed labor, and furnished supplies, upon the faith of the acquiescence by the representative of the bondholders in the receivership proceedings.

To this we reply that there is no evidence at all that the holders of these certificates were in any way misled by, or were influenced to act upon, the conduct of the bondholders or their trustee. They were charged with notice of the mortgage, because it was recorded long before the receiver was appointed. They also were advised that all of the indebtedness incurred by Brooks—which comprised the larger part ²⁶² now in controversy as having been contracted by Bishop, and is really the same debt in a new form—was incurred under an order of the court which specifically made it inferior to the lien of the mortgage. The fact that subsequently the certificates issued by Bishop were made superior to the mortgage lien in no wise affects the question now before us; and when it is considered that the court reserved to itself the right to determine the rank of the liens in the final decree, it cannot be said that certificate holders relied upon acquiescence or consent of prior lienholders, or that the appellant, as the representative of the bondholders, is either estopped, or has acquiesced in, or has been negligent in asserting their right and protesting against the subordination of the mortgage lien; particularly when it promptly objected to the action of the trial court, and has diligently prosecuted an appeal from its judgment.

It was not incumbent upon the mortgagee to foreclose the mortgage at any particular time. It might select the forum and the time for that purpose, and merely because it took no active steps to intervene in the suit of the unsecured creditor, when considered in the light of the character of that suit, should not operate to displace its prior vested right. Indeed, the bondholders had a right to suppose—and nothing occurred to make them think otherwise—that the expenses of the receivership were to be paid out of the profits of the business, and the first orders of the court confirmed them in this supposition; and whenever there was an occasion, either in response to a notice to appear in answer to a petition of the receivers or in private conversation, they all objected to any action that in any wise impaired their prior lien.

It may be and is unfortunate that the holders of these certificates are to lose their money, because it is conceded that there was realized at the foreclosure sale much less than the amount

of the bonds; but so, also, would it be a greater hardship upon, and a flagrant injustice to, the persons who advanced their money to the company, the common debtor, and prudently took a prior lien upon its property, to have ²⁶³ their rights subordinated to obligations subsequently incurred in carrying on the business of the company by receivers who were appointed to manage the property so as to get something for junior creditors.

It is said, moreover, and authorities are cited to that effect, that a trustee of a mortgage represents the bondholders, and even though the latter are not actual parties to a suit, what binds the trustee binds the bondholders. We have no disposition to question this doctrine when fairly applied, but it is wholly foreign to the facts of this case. In a suit brought by the trustee of a mortgage to foreclose the same, or when he is in court as a party defending the validity of bonds or protecting the interests of his beneficiaries, or when his action is within the scope of the power as defined by the instrument creating the trust relation, the doctrine is applicable. We do not think that in the bank suit the trustee could have bound the bondholders by any action which it took. A case quite in point is *Farmers' Loan etc. Co. v. Centralia etc. Ry. Co.*, 96 Fed. 636. But if such were the case, the trustee (the appellant here) did nothing, by way of consent or otherwise, that would authorize the court to subordinate the lien of the mortgage. We repeat that, on every occasion when called upon to act, the trustee and the bondholders, so far as this record shows, protested against anything that would give preference over them to persons dealing with the receiver.

In addition to the foregoing considerations it is important to bear in mind that almost the entire indebtedness incurred by the receivers in carrying on the business under the orders of the court grew out of the operation of the southern properties, none of which was included in the mortgage. The only interest which the United Coal Company had in these properties was a lease which gave it the right to mine coal, but in no circumstances were the bondholders interested in that venture. If any profit was realized from the operation of the southern properties, the bondholders got no benefit from it, and if any losses occurred, it is difficult to conceive ²⁶⁴ why the same should be saddled upon them. They never consented to the act of the United Coal Company in acquiring these leasehold interests, and even if there was a clause in the mortgage providing that after-acquired property should be subject to its provi-

sions, the bondholders could not, against their wish, be compelled to accept these leasehold interests, nor should they, in the bank receivership case, be compelled to pay the losses sustained in their operation.

The injustice of the decree of the lower court will again be more clearly perceived when it is stated that, before the decree of foreclosure was entered and the sale of the mortgaged property made, all interest which the United Coal Company had in the Oak Creek and Peerless mines was disposed of under the orders of the court, or relinquished by the bondholders' receiver; and so whatever value, if any, these leasehold interests represented which, under some possible contingency, might have been realized by the bondholders through a foreclosure sale, was entirely lost to them. Notwithstanding that fact, they are sought to be taxed with the cost of operating property in which they never had any interest, to which they made no claim, and from which no conceivable advantage could accrue to them.

The additional point is made that the German National Bank has the right of contribution from the other bondholders, to which the certificate holders claim the right of subrogation. The argument is that the majority of the bondholders neglected to foreclose, and the German National Bank, as the pledgee of certain of the bonds, for the purpose of protecting its interests as a bondholder, was obliged to step in to preserve the property for the mortgagee, and that, in equity, the minority bondholders were entitled to a contribution from the majority for the expense of the receivership. The fault in this argument is that the premise is not true. As we have already said, the object of the German National Bank was not to protect the bondholders, or to preserve the property covered by the mortgage, but to prevent the alienation of certain other property subsequently acquired ²⁶⁵ by the mortgagor to which the unsecured creditors, if they realized anything at all, must resort for the satisfaction of their claims.

The case in a nutshell is this: A mortgagor, to secure its indebtedness, gives a mortgage on its property. Afterward it acquires other property to which the lien of the mortgage does not attach, and, in conducting its business, it incurs other indebtedness which is unsecured. The unsecured creditor brings a suit to prevent the mortgagor from disposing of the subsequently acquired unencumbered property, which, if it was allowed to do, would prevent its subjection to a judgment sought

to be recovered upon the unsecured indebtedness. A receiver is appointed to take charge of all the property, both that covered by, and that free from, the mortgage, to the end that something may be saved for junior creditors. In carrying on the business losses are sustained, a large part of which results from managing and operating the property not covered by the mortgage. These expenses of administration are sought to be charged against the mortgaged property and made a lien superior to that of the mortgage.

The mere statement of the case, it seems to us, shows the injustice of this attempted perversion of a benign principle of equity which has no application whatever to the facts of the case in hand.

An argument is made in one of the briefs that the court is bound, under the well-established rule of appellate courts, by the findings of fact made by the trial court, among which, it is said, were: That it was necessary that those properties should be operated as a whole; that it was for the best interests of the bondholders, as well as of the unsecured creditors, that the business of coal mining should be carried on in the usual way to the end that the unsecured, as well as the secured, creditors of the United Coal Company should be paid; and that it was necessary to the preservation of the entire property that the business should be carried on as it was before the receiver took possession.

²⁴⁶ We find no justification in the facts of this record to sustain any such findings of fact, if any such were made. Indeed, there are no facts at all upon which such a conclusion can be reached. While we are mindful of the many perplexing questions which arose in this case, and though the intention of the trial court was to deal justly by these parties, and every endeavor was put forth to bring order out of chaos and make of the business a paying one, nevertheless the results are the strongest argument against such attempts by courts of equity to conduct the business of an ordinary private corporation in which the corporation itself has signally failed. It is but another unfortunate experiment unwisely undertaken by a court of equity to do that which business men are unable themselves successfully to accomplish, and the disastrous results of the experiment furnish a convincing argument against the extension to ordinary commercial corporations of the modern doctrine which has grown up out of the necessities of the case when the properties of insolvent railroad corporations have been

foisted upon the federal courts by importunate bondholders, who are compelled to resort to them to foreclose their mortgages and preserve the security of their liens. In such cases it can readily be understood, when the bondholders themselves invoke the extraordinary powers of a court of equity, why they should be compelled to pay the expenses of preserving the property which, in the case of a railroad company, can only be done by continuing to carry on its business, and, if necessary, to have the expenses thereof impressed as a lien upon the corpus of the property, if the profits of the business are inadequate. No reason exists for the application of such doctrine to the case of an ordinary private business corporation.

There may be cases where a purely private business enterprise may be conducted by a court of equity temporarily, because that may be the only way to preserve the status of the property, but such is not the case before us, and there are no facts present in this record to justify a court, in the exercise of its equitable powers, in subordinating the lien of this ²⁶⁷ mortgage to the claims of those who hold the receiver's certificates.

The decree of the district court, in so far as it establishes the claims of the appellees as a first and paramount lien upon the corpus of the mortgaged property, must be reversed, and the cause remanded with instructions to establish the mortgage as a paramount lien thereto, and to modify the decree to conform to the views herein expressed, and, as thus modified, the decree to stand.

Power to Create Liens by Receivers.*

A receiver is an officer of the court, appointed for the purpose of preserving the property in litigation for the benefit of those entitled to it, and his powers are those conferred upon him by the order appointing him, or those which a court of equity may confer upon him in the exercise of its powers recognized in such cases. A receiver has no inherent power in and of himself, but only such as the court appointing him has authority to confer. This limitation on the power of a receiver applies to his power to create liens upon the property in his possession. Indeed, it is not the act of the receiver which in reality creates the lien, but the order of the court, when acting within the scope of its equity powers. The court alone has power to give the receiver authority to create liens. A receiver.

*REFERENCES TO MONOGRAPHIC NOTES.

Claims which take precedence over mortgages of railway and like property: 54 Am. St. Rep. 400-413.

The relation of receivers to pre-existing liens, and the remedies for their enforcement: 71 Am. St. Rep. 352-381.

merely by virtue of his general authority, has no such power: *Vilas v. Page*, 106 N. Y. 439, 13 N. E. 743; *Wyckoff v. Scofield*, 103 N. Y. 630, 9 N. E. 498; *Cowdrey v. Galveston etc. R. R. Co.*, 93 U. S. 352; *Hand v. Savannah etc. R. R. Co.*, 17 S. C. 219.

Liens for Debts Created Prior to Receivership.—The liens which may be created on the trust property by a receiver, or rather by the court appointing him, are not limited to debts created since the receivership. A certain class of debts created within a reasonable time prior to the appointment of the receiver may, under certain circumstances, be made paramount to liens existing at the time the receiver is appointed. Ordinarily, these prior debts are not, in the strict sense of the term, liens upon the trust property, but they are held to have an equity which entitles them to a priority of payment. The effect, however, is precisely the same as if they had been made a paramount lien upon the trust property, and there is no doubt that the court has power to declare them a prior lien either by ordering the issuance of receiver's certificates to raise money for their payment, or in some other manner: See *International etc. R. R. Co. v. Coolidge (Tex.)*, 62 S. W. 1097; *Union Trust Co. v. Illinois Midland Co.*, 117 U. S. 434, 6 Sup. Ct. Rep. 809; *Miltenberger v. Logansport Ry. Co.*, 106 U. S. 286, 1 Sup. Ct. Rep. 140. It will be seen in a later part of this note that the priority given to claims of this character has been usually confined to railroad and similar quasi public corporations. The principles upon which these claims are allowed to take precedence over mortgages of railway and like property will be found fully stated in the extended note in 54 Am. St. Rep. 400-433. We need at this time merely to call attention to the cases which have arisen since that note was written, and to point out the limits within which this doctrine is being confined.

Under the rule as stated in 54 Am. St. Rep. 400-433, debts contracted prior to the receivership are entitled to priority in payment out of the income of the trust property, and may even be declared a lien upon the corpus of the property if necessary, superior to the lien of a prior mortgage, if such debts were incurred for operating expenses necessary to keep the railroad a going concern. And debts incurred for labor and supplies in the every-day operation and management of the road were entitled to a preference, independently of the question whether there had been a diversion of the current income from the payment of current debts to the benefit of prior lienholders, either by the payment of interest on the mortgage debt, the purchase of property, or the making of permanent improvements. Undoubtedly, this rule had the support of judicial authority, and perhaps the weight of authority still favors a preference to such debts contracted prior to the receivership, independently of the doctrine of diversion: See *Lee v. Pennsylvania Traction Co.*, 105 Fed. 405; *St. Louis etc. R. R. Co. v. O'Hara*, 177 Ill. 525, 52 N. E. 734, 53 N. E. 118; *International etc. R. R. Co. v. Coolidge (Tex.)*, 62 S. W. 1097.

But there is a manifest tendency in the recent cases to confine the doctrine that prior debts for current operating expenses should be given a preference over mortgage indebtedness to the surplus income alone, and to refuse to allow a lien for such debts on the corpus of the property unless there has been a diversion of the income either before or during the receivership. This limitation of the rule is perhaps no more fully and ably discussed than by Judge Lurton of the circuit court of appeals for the sixth circuit, in the recent case of *International Trust Co. v. Townsend etc. Co.*, 95 Fed. 850. The syllabus to the case summarizes the discussion and states the rule thus: "The doctrine announced in *Fosdick v. Schall*, 99 U. S. 235, and the cases following it is, that the current income of a railroad is primarily applicable to the payment of its operating expenses, including proper equipment and necessary repairs, and that such expenses are an equitable charge on the income earned during a receivership, though incurred previously by the company, within such reasonable time as shall be fixed by the court, and without regard to whether or not income has been diverted; but the right to such preference extends to income only, and the rule does not authorize a court to displace liens on the corpus of the property in favor of supply creditors except where and to the extent that income which should in equity have been applied to the payment of their claims has been diverted for the benefit of the lienholders, either by the payment of interest therefrom, the purchase of property, or in making permanent improvements on the property; and where there has been no such diversion, either before or during the receivership, and there are no surplus earnings of the receivership, a supply creditor of the company is not entitled to payment from the proceeds of the road, when sold, in preference to the mortgagees." This case was followed in *Rhode Island etc. Works v. Continental Trust Co.*, 108 Fed. 5, *Gregg v. Mercantile Trust Co.*, 109 Fed. 220, and *Illinois Trust etc. Bank v. Doud*, 105 Fed. 123. Intimations similar to the holding in these cases are to be found in *Virginia etc. Coal Co. v. Central R. R. etc. Co.*, 170 U. S. 355, 18 Sup. Ct. Rep. 657, and *Southern Ry. Co. v. Carnegie Steel Co.*, 176 U. S. 257, 20 Sup. Ct. Rep. 347.

There is also a well-defined tendency, at least in the United States courts, to restrict the class of debts arising before the receivership to which a preference in payment is given. The broad language of *Fosdick v. Schall*, 99 U. S. 235, that "necessary operating and managing expenses, proper equipment, and useful improvements," are to be given a preference in payment, and that such expenses can be made a lien on the trust property superior to that of a prior mortgage, has been limited by later cases. And in the late case of *Illinois Trust etc. Bank v. Doud*, 105 Fed. 123, the test of the preferential equity of a prior claim was said to be whether it was for a part of the current expenses of ordinary operation. And neither the fact that the expense tended to improve the property and increase the security of the mortgagee, nor the fact that it

was necessary to keep the mortgagor a going concern, are sufficient to give the claim a preference over the lien of a prior mortgage: See *Rhode Island Locomotive Works v. Continental Trust Co.*, 108 Fed. 5. Supplies furnished in such quantities that reconstruction and not repair is evidently the object in purchasing them are not the basis of a claim entitled to a preference: *Lee v. Pennsylvania Traction Co.*, 105 Fed. 405. Indebtedness incurred in the work of original construction or reconstruction are denied priority in payment over mortgage bonds: *First Nat. Bank v. Ewing*, 103 Fed. 168.

Liens for Debts Created During the Receivership.—So far as concerns the creation of liens to secure the payment of debts incurred during the receivership, such debts and their payment are said to stand upon a different basis from the debts which arise prior to the receivership: *Miltenberger v. Logansport Ry. Co.*, 106 U. S. 286, 1 Sup. Ct. Rep. 140. At the present time, there can be no doubt that a court of equity may, through its receiver, take charge of the property of a railroad corporation, authorize such receiver to raise money for the preservation and operation of the road, and make such expenses a lien on the property superior to that of prior mortgages. The power of a court of equity, through its receiver, to create liens on the trust property was fully considered in *Wallace v. Loomis*, 97 U. S. 146, the court reaching this conclusion, that: "The power of a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of encumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot, at this day, be seriously disputed. It is a part of that jurisdiction, always exercised by the court, by which it is its duty to protect and preserve the trust funds in its hands. It is undoubtedly a power to be exercised with great caution, and, if possible, with the consent or acquiescence of the parties interested in the fund." The doctrine of this case has been repeatedly approved: See *Miltenberger v. Logansport Ry. Co.*, 106 U. S. 286, 1 Sup. Ct. Rep. 140; *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. Rep. 809; *Kneeland v. Bass Foundry etc. Works*, 140 U. S. 592, 11 Sup. Ct. Rep. 857; *Kneeland v. American Loan etc. Co.*, 136 U. S. 89, 10 Sup. Ct. Rep. 950; *Kneeland v. Luce*, 141 U. S. 491, 12 Sup. Ct. Rep. 32; *Vilas v. Page*, 106 N. Y. 439, 13 N. E. 743.

The power to create liens which shall be a charge upon the corpus of the property, paramount to a prior mortgage has been extended to cover the expense of completing and equipping a road which was uncompleted and only partially equipped when the receiver was appointed: *First Nat. Bank v. Ewing*, 103 Fed. 168.

The receiver may, however, create liens only upon the property of which he has been appointed receiver. Thus a receiver of a railroad which has only a leasehold interest in the property has

no power to create liens upon the interest of the lessor who is not a party to the receivership proceedings. Hence, where a receiver of such a railroad makes improvements and repairs on the property, although necessary to keep the road a going concern, the expense incurred cannot be made a lien on the corpus of the property superior to the interest of the lessor, the lease not giving the lessee a right to make improvements at the lessor's expense, and the lessor not being bound at common law to make any repairs or improvements on the leased property: *Felton v. Cincinnati*, 95 Fed. 336.

The power to create liens upon railroad property superior to the lien of a prior mortgage should be exercised with great caution, and it has been said that the issuance of receiver's certificates which shall be a paramount lien, should never be made without giving notice to those whose interests are to be affected, so that they may have an opportunity to be heard in opposition. For, as was observed by the court in *Osborne v. Big Stone Gap etc. Co.*, 96 Va. 58, 30 S. E. 446: "It is indeed elementary that no man can rightly be deprived of his property, or any security or lien which he may have acquired, except by his own consent, or his own negligence or default, or by proceedings had in accordance with the law of the land—that is, an opportunity to be heard in defense of his rights." And in *Metropolitan Trust Co. v. Lake City Elec. Ry. Co.*, 100 Fed. 897, it was held not to be within the power of a court of equity which had appointed a receiver to authorize him to issue certificates of indebtedness which should be a lien upon the property of the corporation superior to the liens of other creditors who were not parties to the suit. And while receiver's certificates cannot be made a lien superior to that of prior creditors without at some time giving to such creditors an opportunity to be heard, yet prior notice does not seem to be essential. Speaking on this point in *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434-456, 6 Sup. Ct. Rep. 809, Justice Blatchford said: "Its [the court's] power to do this does not depend upon consent, nor on prior notice. Consent is desirable, but is seldom practicable where the debts exceed the value of the property. Though prior notice to persons interested, by notifying them as parties, first requiring them to be made parties, if they are not, is generally the better way, yet many circumstances may be judicially equivalent to prior notice. A full opportunity, as in this case to be heard, on evidence, as to the propriety of the expenditures and of making them a first lien, is judicially equivalent. The receiver, and those lending money to him on certificates issued on orders made without prior notice to parties interested, take the risk of the final action of the court, in regard to the loans."

There can be no doubt of the power to create liens on the property of a railroad corporation by the issuance of certificates, which shall be superior to claims arising subsequently on contracts made with notice thereof: *Kempmann v. Sullivan* (Tex.), 63 S. W. 173.

The doctrine that claims of a certain character necessary to keep a railroad a going concern are entitled to priority of payment over its prior mortgage indebtedness, and may be made a lien on the property of the railroad superior to such mortgage debts, has, seemingly, never been applied by the United States supreme court to any but a railroad corporation: *Wood v. Safe Deposit Co.*, 128 U. S. 416, 9 Sup. Ct. Rep. 131. Such doctrine was, however, very properly applied to the case of telegraph and telephone companies, which were given the power of eminent domain, and otherwise recognized as being important public agencies of modern industry, in *Keelyn v. Carolina etc. Tel. Co.*, 90 Fed. 29. And the same principle was in *Illinois Trust Co. v. Ottumwa Elec. Ry.*, 89 Fed. 235, applied to an electric lighting company, which had a municipal franchise, with the right to use the city streets, and which was engaged in furnishing light to the city as well as supplying private consumers: See, also, *Illinois Trust etc. Co. v. Doud*, 105 Fed. 123.

Creation of Liens by Receivers of Private Corporations.—Under the authority of the cases already cited there can be no doubt that a court of equity has power, through a receiver appointed by it, to create liens upon the property of a quasi public corporation which is under its control, which liens will be superior to those of prior mortgages. The question has arisen whether this doctrine of priority can be applied to a purely private corporation, and whether, upon the appointment of a receiver for such a corporation, he may continue the corporate business and, in connection therewith, contract debts which will be declared prior liens upon the corporate property. The principal case is authority for the rule that this doctrine is to be confined to quasi public corporations. And two very recent cases in Colorado approve the decision of the principal case: *Lamar Land etc. Co. v. Belknap Sav. Bank* (Colo., March, 1901), 64 Pac. 210, and *Belknap Sav. Bank v. Lamar Land etc. Co.* (Colo., March, 1901), 64 Pac. 212. These cases hold that a land and canal company, organized for the purpose of reclaiming and selling arid lands for the benefit of its stockholders and grantees is not a quasi public corporation, necessary to be operated for the public good, and hence a receiver of such a corporation has no authority to issue receiver's certificates which shall be superior to the lien of prior mortgage bonds. Certainly, as applied to unsecured claims arising prior to the appointment of the receiver, the doctrine of priority cannot be applied to private corporations; and, aside from the Colorado cases cited, there are other courts which hold that this doctrine is inapplicable to purely private corporations, since their continued operation is not a matter of public concern: See *Merriam v. Victory Min. Co.*, 37 Or. 321, 56 Pac. 75, 58 Pac. 37, 60 Pac. 997; *Newton v. Eagle etc. Mfg. Co.*, 76 Fed. 418, and the cases cited in the monographic note in 71 Am. St. Rep. 380. If the mortgage bondholders or the holders of other prior liens upon the property of a private corpora-

tion agree that the receiver shall continue the corporate business and consent to have the expenses incurred by him made a prior lien upon the property of the corporation, the court will recognize and give effect to such agreement: *Reinhart v. Augusta Min. etc. Co.*, 94 Fed. 901. And the rule has been stated in some of the cases that a court cannot authorize the issuance of receiver's certificates for the purpose of carrying on the business of such a corporation or of improving or adding to its property, without the consent of creditors whose liens would be thereby affected: *Baltimore Building etc. Assn. v. Alderson*, 90 Fed. 142; *Mears v. Hayden*, 91 Ill. App. 343.

However, the appointment of a receiver is for the purpose of preserving the property for the benefit of those concerned, and in properly performing that duty different kinds of care may be required to be used. And there may be cases in which the best and perhaps the only way of preserving the property is to keep the business in which such property is used a going concern. And in such a case it would seem that the receiver might be empowered to issue certificates which should become a first lien on the property. That such a case might exist was clearly intimated in *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 455, 6 Sup. Ct. Rep. 809: "Property subject to liens and claims and debts, of various characters and ranks, which is brought within the cognizance of a court of equity for administration, and conversion into money, and distribution, is a trust fund. It is to be preserved for those entitled to it. This must be done by the hands of the court, through officers. The character of the property gives character to the particular species of preservation which it requires. Unimproved land may lie idle, with only payment of taxes. Improved property should be rented. Movable property that is not perishable may be locked up and kept; but, if perishable, it must be sold, by way of preservation." In other words, in preserving property in the hands of a court, the means used must be adapted to the peculiar character of the property to be preserved. A similar rule was recognized in *Fidelity etc. Co. v. Roanoke Iron Co.*, 68 Fed. 623, where the court held, as indicated by the syllabus, that: "A court of equity has no power, without the consent of all lien creditors, to authorize the receiver of an insolvent private corporation, whose business is not affected with any public interest, to issue certificates which will be a paramount lien upon its property, for the purpose of carrying on its business, unless it be necessary to do so in order to preserve the existence of the property or franchises." We believe this to be a sound rule, but it requires great care in its practical application. The very late case of *Makeel v. Hotchkiss*, 190 Ill. 311, post, p. 131, 60 N. E. 524, recognizes that there may be cases where a court of equity, through a receiver, has power to make the expenses of the receivership of a private corporation a lien upon the trust property superior to prior liens. It recognized this doctrine as rather an exception to a general rule than a rule in itself, and that it should be

applied with great caution, and denied its application in this particular case, which was a hotel receivership, where the mortgagor whose lien was affected was not a party to the receivership suit, only the ownership of the equity of redemption was involved, and where the amount realized at the sale was only sufficient to pay the mortgage debt and costs. It must be perfectly clear, however, that the expenses incurred by the receiver were absolutely essential to the preservation of the property in his control, otherwise the court has no power to make them a lien thereon superior to that of prior mortgages. Thus in *Raht v. Attrill*, 106 N. Y. 423, 60 Am. Rep. 456, 13 N. E. 282, a receiver was appointed for hotel property, and it appeared that the wages of a large number of laborers employed around the hotel were in arrears, many of such employes were destitute, and threatened, unless paid, to burn the hotel. Under these circumstances, receiver's certificates were issued, and the money advanced on them was used to pay off the arrears of wages. The court of appeals held, notwithstanding these facts, that they did not justify the issuance of the certificates, that the debt created by the receiver was not for the preservation of the property, and that it could not be assumed that the ordinary agencies of the law were insufficient to furnish the necessary protection. In *Lane v. Washington Hotel Co.*, 190 Pa. St. 230, 42 Atl. 697, the court considered it very doubtful whether there was any sound judicial reason for allowing a receiver to continue the business of an insolvent hotel corporation, and recognized the rule as well established that a receiver for a private corporation had no authority to interfere with the liens or other legal rights of existing creditors. On the other hand, the United States supreme court held that a court had discretion to allow its receiver temporarily to carry on the business of a hotel, when the interests of the parties seemed to require it: *Cake v. Mohun*, 164 U. S. 311, 17 Sup Ct. Rep. 100. In this case the closing of the hotel would have resulted in serious loss. In *Thornton v. Highland Ave. etc. R. R. Co.*, 94 Ala. 353, 10 South. 442, a receiver who was directed to continue the business of a hotel was held to have power to make his expenses a first lien on the corpus of the trust property. In *Grainger v. Old Kentucky Paper Co.*, 20 Ky. Law Rep. 1491, 49 S. W. 477, where an insolvent paper manufacturing company was continued by a receiver as a going concern, the assets of the corporation were applied to the payment of the claims of laborers and materialmen, under the mechanic's lien law, and also to the payment of a receiver's commission and an attorney's fee, before anything was allowed to prior lienholders, the court holding that under the circumstances it was proper to allow the receiver to continue to run the paper mill, as such property would sell for a much better price as a going concern than if it had remained idle. And the supreme court of Indiana in *Blythe v. Gibbons*, 141 Ind. 322, 35 N. E. 557, found no obstacle whatever in sustaining the order of a court directing the receiver of a purely private manufacturing company to borrow money for the purpose

of continuing the insolvent business and to make such debt a first lien upon the trust property. No distinction is drawn in this case between a private business and one of a quasi public character. The supreme court of Texas, in *Ellis v. Vernon Ice etc. Co.*, 86 Tex. 109, 23 S. W. 858, while admitting that the precedents for the exercise of the extraordinary power of authorizing receivers to create debts, and to make them a first lien upon even the corpus of the trust estate, were to be found almost entirely in the case of the property of railway corporations, yet held that the power existed in the administration of other corporations equally with railways, when the same conditions called for its exercise. The same rule was adopted by the Illinois supreme court in *Knickerbocker v. McKindley Coal etc. Co.*, 172 Ill. 535, 64 Am. St. Rep. 54, 50 N. E. 330, where the court said: "The object of appointing a receiver is to preserve the property for the benefit of all parties interested. Sometimes this object is best attained by continuing a business. When this is done, the court has the right, although it should exercise such right with great caution, to make the expenses of such business chargeable upon the corpus of the property, if the income is not sufficient to pay the same. Of course, such expenses must be charged first upon the net income, but, when that is not sufficient, they may be charged upon the property itself, or upon its proceeds after sale. It has been held that, although this authority of a receiver to incur indebtedness, in order to keep the business a 'going concern' until the rights of the parties are adjusted and a sale is effected, ordinarily arises only in cases of railroad companies, yet the same rules may be applied in other cases under like circumstances." The rule that the receiver of a private corporation cannot be authorized to incur expenses which shall be made a first lien on the corpus of the trust property superior to the lien of prior mortgages will be found supported by the cases cited in the extended note in 71 Am. St. Rep. 880.

LOWER LATHAM DITCH COMPANY v. LOUDEN IRRIGATING CANAL COMPANY.

[27 Colo. 267, 60 Pac. 629.]

RES JUDICATA — PARTIES — NOTICE OF ACTION.—A prior judgment is not res judicata as respects the rights of a plaintiff in a subsequent action, where he was not a party to the action in which the prior judgment was rendered, although he had notice of the pendency of the action, since identity of parties is an essential element necessary to render a judgment in one case res judicata in another.

WATER RIGHTS — ESTOPPEL — LACHES — ABANDONMENT.—A prior appropriator of water is not estopped by his own laches from asserting his rights against subsequent appropriators,

where during several years of scarcity he was short of water, knew that such shortage was caused by diversions made by such subsequent appropriators, and made no protest against these diversions.

ESTOPPEL—ELEMENTS.—To constitute an estoppel by conduct in favor of another with respect to the title of the subject matter in dispute, it must appear that the party against whom such estoppel is sought to be established was apprised of the true state of his own title, that by his conduct he intended to deceive or was guilty of such negligence as amounted to fraud, and that the other party was not only destitute of all knowledge regarding the true state of his title, but of the means of acquiring such knowledge.

WATER RIGHTS—RIGHT OF PRIOR APPROPRIATOR—DEFENSE.—In an action by a prior appropriator of water against subsequent appropriators who have wrongfully diverted water from him, it is no defense that others junior in point of time to the defendants may have diverted water which, if allowed to flow down the stream, would have supplied the needs of both the plaintiff and the defendants.

ADVERSE POSSESSION.—COLOR OF TITLE. In order to constitute adverse possession under the statute of limitations, must be based upon a paper title.

WATER RIGHTS—LOSS THROUGH PERCOLATION—PRIORITY.—In an action by a prior appropriator of water to prevent junior appropriators above him from diverting the waters of a stream, it is no defense that a considerable volume of such waters would be lost through percolation before they reached the plaintiff's ditches.

H. N. Haynes, for the plaintiff in error.

Frank J. Annis, Robinson & Love, George W. Bailey, and Garbutt & Garbutt, for the defendants in error.

²⁶⁸ GABBERT, J. Plaintiff in error originally instituted suit against each ditch company separately. In each action the individual defendants were joined. The questions in the several cases being the same, they were consolidated for the purposes of ²⁶⁹ trial. Upon the issues formulated there was a trial to the court, which resulted in judgment in favor of the defendants. Plaintiff brings the case here on error. For convenience, the parties will be designated plaintiff and defendants, the same as in the court below.

The object of the action is to compel defendants to recognize the decreed priorities of plaintiff to the waters of the South Platte river. The facts, so far as necessary to notice at the outset, in order to understand the controversy between the parties, are, briefly, as follows: Each of the ditches of the respective ditch companies has been decreed, or has succeeded to priorities adjudicated under the general irrigation statutes of the state. The ditch of plaintiff draws its supply from the South Platte, about one and one-half miles below the mouth of the Big Thompson, a tributary of that stream. Its

headgate is located in water district No. 2, and its priorities were adjudicated in the district court of Arapahoe county. The ditches of the defendant ditch companies draw their supply from the Big Thompson, their several headgates being located in water district No. 4, and their priorities were adjudicated in the district court of Boulder county. Each of these water districts is located in water division No. 1. Relatively, the priorities of the respective ditches, as shown by the several adjudication decrees, are such that certain of those of plaintiff are in advance of the priorities of defendant ditch companies.

Defendants interposed defenses by which they seek to establish that plaintiff is no longer entitled to a distribution of water in times of scarcity, in accordance with its decreed priorities, as against their rights, and that they are entitled to have their priorities satisfied without regard to those of plaintiff; or, in other words, by reason of defenses pleaded, the latter, as against them, has lost its rights established by the decree upon which it relies, and that they are entitled to a distribution of water under the decree entered in water district No. 4, without regard to the decree rendered in district No. 2. The pleadings and evidence disclose that by reason ²⁷⁰ of the attitude and acts of the defendant ditch companies, the individual defendants charged with the duty of distributing water in their respective water districts, plaintiff has been deprived of water to which it is entitled under the decree establishing its priorities, unless one or more of the affirmative defenses of defendants defeat its rights evidenced by that decree. The vital question is, Do the respective adjudication decrees measure the rights of the parties, or are they to be determined upon one or more of the defenses interposed by defendants? These defenses are:

1. A judgment which they claim is *res judicata* of the questions involved in this action.

2. Estoppel by laches and acquiescence.

3. That in water districts located above No. 2, which includes the South Platte river above the headgate of plaintiff's ditch, and tributaries emptying into the river above that point, are numerous ditches drawing their supply of water from these streams, the priorities of which, according to the respective decrees as entered of record in the respective water districts, are junior to those of the parties to this proceeding,

and that by reason of their diversion of the water, the shortage of which plaintiff complains is occasioned.

4. Diversion of water from the Big Thompson for more than seven years next preceding the date of the commencement of this action, under color of title in good faith, adversely to the claims of plaintiff, and all persons diverting water from the South Platte river.

5. It is also claimed by defendants that the evidence establishes the fact that the waters of the Big Thompson reaching their respective headgates would not reach that of the plaintiff if permitted to flow down the stream, by reason of the character of the bed of the Big Thompson.

Priority of appropriation for beneficial use has always been recognized as the foundation upon which water rights depend in this jurisdiction. This doctrine first found expression in the courts, and has since been recognized by our fundamental and statutory law on the subject. For the purpose of having ²⁷¹ priorities judicially determined, the legislature enacted laws for that object. Unfortunately, the water districts as originally established did not in each instance embrace the entire drainage of a main stream. To obviate the difficulties resulting from these conditions water divisions were created, which practically embrace all the drainage of a given stream. Provision has also been made for the appointment of an official in each of these divisions whose duty it is to direct that the waters of the streams of each division be distributed in accordance with the adjudication decrees of the districts included in each water division, so that in effect these decrees are to be treated as one, and the water distributed accordingly. Under such regulations the acts of the individual defendants, as well as those of the defendant ditch companies in refusing to distribute the water of the South Platte and its tributary, the Big Thompson, or to recognize the rights of plaintiff in accordance with the adjudication decrees in districts 2 and 4, are illegal, against which the plaintiff is entitled to relief, unless, as we have said, the rights of the parties to this controversy are no longer dependent on such decrees, but are to be determined upon one or more of the defenses interposed in this action.

The judgments upon which defendants rely as *res judicata* of their rights in this action were rendered in suits commenced by them separately in the district court of Larimer county on the sixteenth day of July, 1890, against one William A. Bean,

who at that time was the water commissioner in water district No. 4, to compel him to distribute the water of the Big Thompson to each respectively, in accordance with the rights of each as evidenced by the adjudication decree entered in that district. No other parties were made defendants to these actions. It appears that they were commenced because the then superintendent of water division No. 1, at the instance of plaintiff, had directed the water commissioner in district No. 4 to close down the respective headgates of the ditches of plaintiffs in those actions (defendants here), so as to permit the water of the Big Thompson to flow down to the headgate ²⁷² of the ditch company, plaintiff in this action, or had practically directed that the waters of the streams included in water districts Nos. 2 and 4, so far as the parties in this action are concerned, be distributed in accordance with the respective decrees in those districts, considered as a whole. The complaint in neither action, however, contained any averments to this effect, but after stating the need of water, and the decreed priorities in water district No. 4, alleged that the water commissioner "threatens to shut down the headgate of plaintiff's said canal, so as to prevent the plaintiff from taking water so decreed to it as aforesaid, and so used by it, as herein stated." It is claimed that the present plaintiff company was requested to defend these actions; that copies of the papers served on the water commissioner were sent to it, but that it gave the matter no attention whatever. The prayer of the complaint in each case was to the effect that the water commissioner of district No. 4 be restrained from shutting down the headgate of plaintiff's ditch, so as to deprive it of the water to which it is entitled under the adjudication decree in district No. 4. The judgment in each case which was rendered by default against the commissioner directed that he desist and refrain from so distributing or apportioning the waters of the Big Thompson as to allow any, when needed by plaintiff, to flow past the headgate of its ditch, except when such waters are needed by consumers through ditches whose headgates are located on that stream below the headgate of plaintiff's ditch, and whose priorities have been decreed superior to those of plaintiff by the adjudication decree in district No. 4.

The plaintiff in this action was not a party to either of the causes in which the judgments were rendered upon which defendants rely as *res judicata* of the subject matter of this controversy. It may have had notice, or may have known of

the pendency of those actions, but not in a manner which gave the court jurisdiction to determine its rights to the subject matter in dispute in those causes. One of the essential elements necessary to render a judgment pronounced in ²⁷³ a given case *res judicata* in another is identity of parties in each: *Benz v. Hines*, 3 Kan. 390, 89 Am. Dec. 594; *Bouvier's Law Dictionary*, tit. "*Res Judicata*." These judgments lack this requisite.

It is claimed by defendants that from the time of the issuance of *ex parte* injunctions in the causes against Water Commissioner Bean, as well as from the date when final judgments were rendered in those actions, which was on the twenty-eighth day of October, 1890, restraining him from distributing the waters of the Big Thompson, except in accordance with the adjudication decree rendered in water district No. 4, that plaintiff has acquiesced in those judgments; that parties dependent upon a supply of water from the ditches of defendant companies have increased their acreage, and that improvements have been made upon the faith of those judgments, under the belief that they settled their rights to the use of the water as against the plaintiff, and that the action of the latter was such as to lead consumers under the ditches of the former to believe that these judgments would never be questioned.

It is also claimed that plaintiff had notice of the purport of the judgments, and at various times from July 16, 1890, down to the date when this action was commenced, was frequently unable to obtain sufficient water from the river to supply its priorities, and that such shortage, to the knowledge of plaintiff, was occasioned by the diversion of defendant ditch companies during this period. The evidence as to whether or not plaintiff knew of the commencement of these actions is conflicting. There is also conflict in the testimony regarding its knowledge of the rendition of these judgments and their purport; but these matters are not controlling. The evidence may establish that from July, 1890, down to the date when this suit was instituted, plaintiff may have been short of water, which it knew was caused by the diversion of defendant companies' ditches from the Big Thompson. No protest against this action was made. The supply of water in the streams of this state is variable. In times of low water in a stream, or its tributaries, which is the common source of supply for many ditches, some will be unable to obtain their ²⁷⁴ full share. If a failure of one diverting water from a stream to protest

every time a shortage in his supply is occasioned by another withdrawing water to which he is not entitled is to be construed as laches or acquiescence, amounting to an abandonment, priorities, as determined under the statutes, would be of little value. If an estoppel has been established against plaintiff, it must be upon the ground that its action has resulted in an abandonment of its rights, as evidenced by the adjudication decree, and that they have become vested in defendant ditch companies. They were bound to take notice of the rights of plaintiff as determined by this decree. They could not rely upon decrees in their favor in actions to which plaintiff was not a party and which in no manner settled its rights. Although plaintiff may have known of these actions and judgments, such knowledge was no notice to it that title to its priorities had been assailed. There is nothing in the evidence from which to infer that its silence was prompted by an intention to deceive the defendant companies with respect to their rights, nor was its action in this respect negligence to such a degree as to amount to constructive fraud.

We will not attempt to mention all the elements of estoppel as sought to be established in this case, it being sufficient for the purposes of this action to state that before the conduct of one party will create an estoppel in favor of another with respect to the title of the subject matter of dispute between them, it must appear that the party against whom such estoppel is sought to be established was apprised of the true state of his own title; that by such conduct he intended to deceive or thereby was guilty of such negligence as to amount to a fraud; that the other was not only destitute of all knowledge regarding the true state of his title, but of the means of acquiring such knowledge. There must be some degree of turpitude in the conduct of a party before a court of equity will estop him from the assertion of his title, when the effect of the estoppel is to forfeit his property, and transfer its enjoyment to another: *Boggs v. Merced Min. Co.*, 14 Cal. 279; 1 Story's Equity Jurisprudence, sec. 391; 2 Pomeroy's ²⁷⁵ Equity Jurisprudence, secs. 807, 817; *Water Supply etc. Co. v. Tenney*, 24 Colo. 344, 51 Pac. 505.

In our opinion, the evidence wholly fails to establish either of these essential elements of estoppel.

Certain of the priorities of plaintiff are in advance of those of the defendant ditch companies. When required, it is entitled to have them supplied as against the defendant companies

and all others junior in point of time. It may be that others divert water from the river, which results in depriving plaintiff of its rights, but it is not concerned in settling the relative priorities between ditch companies whose rights are junior to its own; that is a matter which they must settle between themselves. The acts of the defendant ditch companies, in supplying their priorities junior to those of plaintiff, at a time when the latter requires the water thus diverted, is an invasion of its rights. If the former permits others to divert water to which they are entitled, or which, if not diverted, would be sufficient to supply the needs of plaintiff, that does not license them to wrong plaintiff, because others have wronged them. In considering the joinder of defendants to an action for the wrongful diversion of water, the late Justice Elliott, after illustrating the necessity for permitting such joinder in speaking of the rights of a prior appropriator to join as defendants those whose rights were junior, said: "He may bring and maintain an action jointly against all parties junior in right to himself, whenever the result of their acts, either joint or several, deprives him of his better right to the use of the water, or substantially interferes therewith. He may thus secure protection to his own priority, and leave the several junior appropriators to settle their relative priorities among themselves": *Saint v. Guerrerio*, 17 Colo. 448, 31 Am. St. Rep. 320, 30 Pac. 335.

The fact, therefore, that others junior in point of time to either of the parties to this action may have diverted water from the river above the mouth of the Big Thompson, which, if permitted to flow down the stream, would have supplied the needs of plaintiff, so that the defendant ditch companies²⁷⁶ could have continued their diversion from the Big Thompson, without injury to the plaintiff, was not a defense which the defendants could interpose.

It is contended by counsel for plaintiff that the defense of the defendants based upon the statute of limitations is insufficient, for the reason that it does not allege payment of taxes, and that the evidence establishes that they have no color of title to the subject matter of controversy. It is not necessary to determine the question of the failure to plead payment of taxes, or whether or not the statute is applicable to water rights, as the evidence fails to disclose that defendants have a paper title such as the statute requires, upon which to base their claim to the use of the waters from the Big Thomp-

son, as against the rights of plaintiff. Color of title, under the statute, must be based upon a paper title: 3 Mills' Annotated Statutes, sec. 2923e; *De Foresta v. Gast*, 20 Colo. 307, 38 Pac. 244; *Knight v. Lawrence*, 19 Colo. 425, 36 Pac. 242.

The decree in water district No. 4 by which the priorities of defendants are established is but evidence of their rights. It does not purport to be adverse to the rights of plaintiff as established by the adjudication decree in water district No. 2. Defendants now seek to establish their rights to the priorities awarded plaintiff under the latter decree by virtue of an adverse user for more than seven years prior to the time when this action was commenced, but the statute upon which they rely cannot be invoked except it appears that their user and possession of the priorities of plaintiff is upon a paper title, which purports to convey to them the priorities of the latter: *Warren v. Adams*, 19 Colo. 515, 36 Pac. 604. The decree upon which they rely does not purport to convey such rights.

The final question relates to the testimony on the subject that the water which defendants divert from the Big Thompson, if permitted to flow by their headgates, would not reach the headgate of the ditch of plaintiff. There is testimony to the effect that on account of the character of the bed of the Big Thompson, considerable time would be required for the water passing the headgates of the ditches of defendants to ²⁷⁷ reach the river, and that in flowing down a considerable quantity would be lost through percolation. There is no evidence that the waters would not reach the river, and although it may flow down the Big Thompson slowly, and a considerable volume be lost, inasmuch as it would eventually reach the river, and could there be utilized by plaintiff, we do not think that this defense has been established.

Under the facts plaintiff was clearly entitled to a judgment in its favor, directing that the waters of the Big Thompson and South Platte, as between the parties to this controversy, be distributed in accordance with the adjudication decrees rendered in water districts 2 and 4. The judgment of the district court is, therefore, reversed, and the cause remanded, with directions to render judgment in accordance with the views herein expressed.

RES JUDICATA.—THE ESSENTIAL ELEMENTS of res judicata are the identity of the parties and of the issue: *Morrison v. Clark*, 89 Me. 103, 56 Am. St. Rep. 395, 35 Atl. 1034. A judgment does not conclude one not a party to the proceeding; *Short v. Galway*, 83 Ky. 501, 4 Am. St. Rep. 168. As to who are parties within

this rule, see the note to *Hill v. Bain*, 2 Am. St. Rep. 876-878; *Walker v. Philadelphia*, 195 Pa. St. 168, 78 Am. St. Rep. 801, 45 Atl. 657; *Arrington v. Arrington*, 127 N. C. 190, 80 Am. St. Rep. 791, 37 S. E. 212.

EQUITABLE ESTOPPEL AS TO TITLE TO LAND is such conduct as prevents a party from setting up his legal title because he has, through his acts, words, or silence, led another to take a position in which the assertion of the legal title would be contrary to equity and good conscience; *Terrell v. Weymouth*, 32 Fla. 255, 37 Am. St. Rep. 94, 13 South. 420. See, also, *Prieve v. Wisconsin State Land etc. Co.*, 103 Wis. 537, 74 Am. St. Rep. 904, 79 N. W. 780.

WATER RIGHTS.—THERE CAN BE NO ABANDONMENT of a water right without an intent to abandon and a relinquishment of the right; *Wimer v. Simmons*, 27 Or. 1, 50 Am. St. Rep. 685, 39 Pac. 6.

DE BORD v. PEOPLE.

[27 Colo. 377, 61 Pac. 599.]

CRIMINAL LAW—ASSAULT—COLLUSIVE CONVICTION—BAR TO SUBSEQUENT PROSECUTION.—A defendant who voluntarily goes before a justice of the peace, swears to a complaint charging himself with an assault, and confesses himself guilty, cannot thereafter plead the judgment against himself, rendered in such a proceeding, as a bar to a subsequent prosecution for the same offense.

Ira J. Bloomfield, for the appellant.

D. M. Campbell, attorney general, Calvin E. Reed, and Dan B. Carey, for the people.

377 **CAMPBELL, C. J.** The plaintiff in error (defendant below) on the 7th of April, 1899, in the county of Saguache, committed an assault upon one H. C. Burton. On the same day he voluntarily went before Dewit C. Travis, a justice of the peace of that county, and swore to a complaint charging himself with such assault, thereby confessing his guilt; whereupon the justice heard his testimony only, and sentenced him to pay a fine of three dollars and costs, which was at once paid.

Upon the same day, and, it seems, after the Travis case was initiated, Burton, the one assaulted, went before another justice of the peace of that county, Peter W. Luengen, and swore to a complaint against the defendant charging him with the same assault; a warrant was thereon issued, and under it the defendant was arrested and brought before the said justice for trial after the termination of the proceedings
378 above mentioned. A plea of former conviction before Jus-

tice Travis was interposed and overruled; trial was had, and defendant fined five dollars and costs, from which he appealed to the county court of Saguache county.

In the county court the defendant again interposed, and in writing, a plea of former conviction before Travis, justice. To this plea the district attorney filed a replication, in substance being that the judgment which Justice Travis rendered was by a court without jurisdiction, was a farce and void as against the people; that such proceedings were fraudulent and instituted by defendant himself merely for the purpose of enabling him to escape proper punishment for his offense, and to evade the law and bar a prosecution duly conducted by the people.

Issue was joined upon this plea before the county court without a jury, and the court found against the defendant, and assessed a fine against him of three dollars and costs. To review this judgment the defendant has sued out a writ of error.

There is only one question in the case, and that is whether a defendant may voluntarily go before a justice of the peace, swear to a complaint charging himself with an assault, confess himself guilty—the justice hearing only the evidence of the defendant himself—and thereafter successfully plead a judgment against himself, rendered in such a proceeding, as a bar to a subsequent prosecution for the same offense by the duly authorized representative of the people in a court of competent jurisdiction.

It is the contention of the plaintiff in error that since he was fined by the justice of the peace before whom he voluntarily went the same amount that was imposed by the county court at the trial in which the district attorney appeared, no fraud was committed, and the law was vindicated.

It has been held, where there was a statute so providing, that one accused of a small offense might voluntarily go before a court having jurisdiction, confess himself guilty, and that the judgment imposed in such a case would be a bar to 379 a subsequent prosecution for the same offense. But even there the statute was strictly construed, so as to minimize the chances for perpetrating fraud. We have no such statute. Section 2768 of Mills' Annotated Statutes (Gen. Stats. 1883, sec. 2014) provides that if any person accused of assault, or assault and battery, shall confess himself guilty, the jury, or if a jury be waived, the justice, shall hear evidence and assess a fine, and the justice shall enter a judgment and issue exe-

cution subject to appeal, as in other cases. This, however, means that the accusation shall be made, not by the defendant himself, or some one acting in his behalf, but by some disinterested person. To countenance such a practice as the defendant insists is proper would furnish to any defendant the means of escaping, in whole or in part, the punishment which his offense merits, and enable him to make a travesty of criminal prosecutions.

Mr. Bishop, in volume 1 of his *New Criminal Law*, at section 1010, thus states the rule: "If one procures himself to be prosecuted for an offense which he has committed, thinking to get off with a slight punishment and to bar a real prosecution in the future—if the proceeding is really managed by himself, either directly or through the agency of another—he is while thus holding his fate in his own hand in no jeopardy. The plaintiff state is no party in fact, but only such in name; the judge indeed is imposed upon, yet in point of law adjudicates nothing; 'all was a mere puppet show, and every wire moved by the offender himself.' The judgment therefore is a nullity, and is no bar to a real prosecution."

There are authorities which hold that if the legal penalty is an exact one, for example, a fine or a fixed sum, or imprisonment for a certain term, and the person carrying on the cause against himself has borne it in full, not merely in part, the state thereby has suffered nothing, and the judgment would not be deemed fraudulent. This exception, if it be sound (as to which we express no opinion), is not applicable to this case, for the penalty for assault under our statute is ³⁸⁰ imprisonment in the county jail for a term not exceeding six months, or a fine not exceeding one hundred dollars. Many authorities might be cited in support of the conclusion reached, some of which are: *State v. Little*, 1 N. H. 257; *Watkins v. State*, 68 Ind. 427, 34 Am. Rep. 273; *Gresley v. State*, 123 Ind. 72, 24 N. E. 332; *Shideler v. State*, 129 Ind. 523, 28 Am. St. Rep. 206, 28 N. E. 537, 29 N. E. 36; *Commonwealth v. Alderman*, 4 Mass. 477; *Commonwealth v. Dascom*, 111 Mass. 404; *Bradley v. State*, 32 Ark. 722; *McFarland v. State*, 68 Wis. 400, 60 Am. Rep. 867, 32 N. W. 226; *State v. Simpson*, 28 Minn. 66, 41 Am. Rep. 269, 9 N. W. 78; *Drake v. State*, 68 Ala. 510; *State v. Smith*, 57 Kan. 673, 47 Pac. 541; *State v. Atkinson*, 9 Humph. 677; *State v. Colvin*, 11 Humph. 599, 54 Am. Dec. 58; *State v. Epps*, 4 Sneed, 552; *State v. Green*, 16 Iowa, 239; *Commonwealth v. Jackson*, 2 Va. Cas. 501; *Clark's Criminal*

Procedure, 393; *De Haven v. State*, 2 Ind. App. 376, 28 N. E. 562.

The judgment is affirmed.

FORMER JEOPARDY.—WHERE BY COLLUSION or fraud a party procures himself to be prosecuted for a crime, he cannot avail himself of a conviction or acquittal in that action as a bar to a subsequent prosecution for the same offense: See the monographic note to *State v. Solomons*, 27 Am. Dec. 477; *McFarland v. State*, 68 Wis. 400, 60 Am. Rep. 867, 32 N. W. 226. This principle is applied to assault and battery cases in *Watkins v. State*, 68 Ind. 427, 32 Am. Rep. 273; *State v. Simpson*, 28 Minn. 66, 41 Am. Rep. 269, 9 N. W. 78.

BEALS v. CONE.

[27 Colo. 473, 62 Pac. 948.]

RES JUDICATA—PARTIES—MINING CLAIM.—To constitute a judgment in one action *res judicata* in another the quality of the parties to each must be the same. Hence a judgment by the land department that certain parties are not entitled to be vested with the fee in a mining claim, rendered upon the hearing of a protest by others who make no claim to the subject matter of the controversy, is not *res judicata* in subsequent adverse action by such protestants as owners of a conflicting claim, since the capacity in which the protestants acted in the protest proceedings is entirely different from their capacity in the subsequent action.

ESTOPPEL.—TO SUFFICIENTLY PLEAD an estoppel based upon statements, it must be averred that the statement relied upon to constitute such estoppel was made with the intention that it should be acted upon.

MINING CLAIM—CANCELLATION OF ENTRY—RES JUDICATA—EVIDENCE.—The cancellation of a mineral entry only is not *res judicata* on another application for a patent, and the facts found, upon which the cancellation is based, are not admissible to support an adverse claim against a second application for the same premises.

MINING CLAIM.—A JUDGMENT OF THE LAND DEPARTMENT, rejecting an application for a patent and nothing more, leaves the applicant with the same rights as though no application had ever been made.

MINING CLAIM—DISCOVERY OF VEIN—TIME OF LOCATION.—The validity of the location of a mining claim depends primarily upon the discovery of a vein or lode within its limits, and is valid from the time of such discovery only, a discovery not relating back to the date of the original location.

MINING CLAIM.—A VEIN, within the meaning of mining law, is a continuous body of mineral bearing rock in place, in the general mass of the surrounding formation, and while it must have boundaries, it is not necessary that they be seen, but their existence may be otherwise determined.

MINING CLAIM—VEIN—WHEN DISCOVERED.—AN INSTRUCTION is properly refused which is based upon the theory

that a vein of mineral bearing rock is not discovered unless its boundaries are disclosed.

MINING CLAIM—BOUNDARY POSTS—WHERE SET.—A statute, relating to the placing of corner posts to mark the surface boundaries of a mining claim, and providing that if a post falls on precipitous ground, where it is impracticable or dangerous to place it, it may be placed at the nearest practicable point, cannot be invoked, when the setting of a stake at the true corner is merely difficult or inconvenient.

APPEAL—EXCEPTION TO INSTRUCTION—SUFFICIENCY.—An exception to the giving of each and every instruction is an exception to each instruction separately, but it is insufficient as an exception to any instruction which contains a correct statement of the law, because it fails to point out that which is incorrect from that which is correct.

TRIAL—JURIES—SUMMONING—OBJECTION.—After trial and verdict in a civil case, a party cannot for the first time raise an objection to the action of the court in directing a certain number of jurors to be summoned by open venire instead of calling jurors of the regular panel from the criminal division of the court who were not needed in such division at that time.

JURIES—APPORTIONMENT—DISCRETION OF COURT.—Where a court is conducted under two divisions, civil and criminal, the apportionment of the regular panel of jurors between such divisions is entirely in the control of the judges, and their action will not be interfered with or inquired into.

MINING CLAIM—VIEWING PREMISES—INSTRUCTION.—Where a jury, upon viewing mining claims which are in dispute, has pointed out to it by the guide the point where a corner stake of one of the claims would fall, this error is cured by a direction of the court to the jury to disregard what was said by the guide, and told that upon this point nothing could be considered except the evidence introduced in the courtroom.

NEW TRIAL.—THE MERE SEPARATION OF A JURY, after the submission of a cause, is not per se sufficient for setting aside the verdict and granting a new trial, unless it appears that by reason of such separation, there is a strong probability that the jury has been tampered with, or improperly influenced to return the verdict which is sought to be set aside.

TRIAL—EXAMINATION OF PREMISES—DISCRETION OF JURY.—Where, under the directions of the court, the examination of the property in dispute is left to the discretion of the jury, a party, who makes no request that a particular portion of the premises shall be examined, cannot complain that the jury, in the exercise of its discretion, examined only such features as, in its judgment, were desirable for the purpose of aiding a better understanding and application of the evidence.

APPEAL—EVIDENCE—VERDICT.—Where there is evidence tending to prove every material issue in the case, an appellate court cannot disturb the findings of the jury.

NEW TRIAL.—NEWLY DISCOVERED EVIDENCE which only goes to impeach the credit or character of a witness is not sufficient ground for a new trial, except it is clear that such impeachment would have resulted in a different verdict.

MINES—EVIDENCE—REBUTTAL—SAMPLES OF ROCK. Where a defendant introduces in evidence samples of rock from a mining shaft which he claimed did not contain mineral, the plaintiff cannot in rebuttal introduce other samples from the same shaft containing mineral, since this does not show that the samples in-

troduced by the defendant were mineral bearing, or that they did not come from this particular mining shaft.

MINING CLAIM—DISCOVERY SHAFT—VEINS IN OTHER SHAFTS.—Under the mining statutes of Colorado a discovery shaft must expose the vein upon which the location is based, and the mere discovery of some other vein in other shafts within the boundaries of the claim cannot supply the absence of the one required to be exposed in the discovery shaft.

MINING CLAIM—DEFINITION.—"CREVICE," as used in a statute relative to a discovery shaft, means a mineral bearing vein.

MINING CLAIM—ANNUAL ASSESSMENT WORK—BURDEN OF PROOF.—After a valid mining location has been made, the title thus acquired remains so until forfeited or abandoned, whether the annual assessment work required by the act of Congress has been performed or not, and a party seeking to initiate a claim to mining premises already legally located has the burden of proving that the annual labor thereon has not been performed, in order to establish that the ground so located is subject to location.

H. B. Johnson and Ralph W. Smith, for the appellant.

Hall, Bryant, Lee & Babbitt, and Charles S. Thomas, for the appellees.

478 GABBERT, J. By way of replication to the answer and counterclaim of appellees, appellant interposed: 1. What purported to be a plea of *res judicata*; and 2. A plea of estoppel in pais.

By the first, it was averred, in effect, that on February 10, 1893, appellees entered the Ophir lode; that thereafter appellant and others filed a protest against such entry, by which it was alleged that no discovery of mineral thereon had been made; that a hearing on such protest was had, which resulted in a finding by the land department of the general government that no discovery had been made on the Ophir; that the discovery shaft thereon was but twenty-five feet in depth, on the eleventh day of October, 1893; that the sinking of such shaft was the only work performed by appellees on the Ophir prior to that date, and that on these findings a judgment was entered canceling the entry.

By the second plea it was averred that the appellee, J. J. Cone, at the hearing above referred to, testified, in substance, that the discovery shaft on the Ophir was but twenty-five feet deep on the eleventh day of October, 1893; that no vein had been disclosed thereon at that time, and that no work had been performed on the claim in the year 1893; that by reason of such testimony, appellant and others interested with him were induced to expend a large sum of money in exploring for mineral in the ground in conflict, between the Tecumseh and

Ophir lodes, and in working and developing the former; that appellees knew that such expenditure was being made on the faith of the truth of the above statements of appellee Cone, but never contradicted such statements; that if appellees performed any work on the Ophir in the year 1893, prior to the eleventh day of October of that year, sunk the shaft to a greater depth than twenty-five feet, or discovered a vein in such shaft, appellant and those working under him were ⁴⁷⁹ ignorant of such facts. To each of these pleas, a general demurrer was interposed, and sustained. This ruling of the trial court is assigned as error.

It will be borne in mind that the application of appellees for patent to the ground in controversy adversed by appellant is in no manner based upon the proceedings resulting in an entry which was canceled as above pleaded, nor do they in any manner base their rights to the ground in controversy by virtue of such application, or the entry thereunder which was afterward annulled. The claim of counsel for appellant is, that the judgment of the land department is *res judicata* of the facts established in the proceeding instituted by appellant and others protesting against such entry. In order to constitute a judgment in one action *res judicata* in another, it must appear that the quality of the parties to each is the same: *Slocum v. De Lizardi*, 21 La. Ann. 355, 99 Am. Dec. 740; *Atchison etc. Ry. Co. v. Commissioners*, 12 Kan. 127; *Freeman on Judgments*, sec. 252; *Bouvier's Law Dictionary*, tit. *Res Judicata*; *Benz v. Hines*, 3 Kan. 390, 89 Am. Dec. 594; *Lower Latham etc. Co. v. Loudon etc. Co.*, 27 Colo. 267, ante, p. 80, 60 Pac. 629.

The judgment rendered by the land department in the matter of the former entry of the land in controversy in no manner settled the rights of the parties to that proceeding to such lands. It merely held that appellees were not entitled to be vested with the fee therein from the general government. The protestants were not parties in interest, because they made no claim to the subject matter of the controversy, and with respect to that proceeding occupied the position of *amici curiae*, with the right of showing that appellees had not complied with the requirements of the law relative to obtaining title from the government for mineral lands at the time of their former application: *Week's Mineral Lands*, sec. 96; *In re Mt. Pleasant Mine*, *Copp's Mineral Lands*, 204.

It is manifest, therefore, that the quality or capacity in which appellant acted in the protest proceedings pleaded is ⁴⁸⁰ entirely different from the capacity in which he appears in the present action.

In order to sufficiently plead an estoppel in pais based upon statements, it must be averred, among other things, that the statement relied upon to constitute such estoppel was made with the intention that it should be acted upon: *Patterson v. Hitchcock*, 3 Colo. 533; *People v. Brown*, 67 Ill. 435; *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365.

In the replication interposed by appellant on this subject, there is no averment that the statements attributed to the appellee Cone were made by him with the intention of deceiving or misleading appellant or those acting with him, nor is there any allegation that supplies the absence of a direct one to this effect. The demurrer to each plea in the replication was properly sustained.

Numerous errors are assigned on the rulings of the trial court with respect to the admissibility of evidence, some of which are new and important. On the trial, appellant offered in evidence the decisions of the department of the interior rendered in the matter of the protest against the former application of appellees for patent on the Ophir lode, together with a notice directed to them, that a hearing had been ordered upon such protest. Each of these was excluded. These decisions were rendered in the proceedings mentioned in the plea of *res judicata*, to which reference has already been made. The principal contention between the parties was, Upon which of the conflicting lode claims was a discovery of mineral first made? The department, in the protest proceedings, found, from the evidence submitted that no discovery of mineral had been made upon the Ophir on the eleventh day of October, 1893. Counsel for appellant contend that these decisions were material evidence, because this finding was conclusive upon that question, and that appellees were precluded from showing a discovery on the Ophir prior to that date. A sufficient answer to this proposition should be that as the judgment rendered in the protest proceedings was not *res judicata* between the parties to this ⁴⁸¹ action, that no fact found by the department in those proceedings would be competent to contradict or establish any fact directly in issue in this. A consideration of the nature of an application for patent to mineral lands which is rejected, and the result of the judgment of the department of the in-

terior which merely holds that the applicant is not entitled to patent, and where the rights of others to the lands embraced in the application are not determined, will demonstrate that no finding of fact made by the department in such case is either conclusive or admissible in evidence in another action, in which the applicant bases no rights to the ground in controversy by virtue of such proceedings. Under the law regulating the issuance of patents to mineral lands, and the rules of the department, certain facts must be established. If not, the application is dismissed. Such a judgment is, in effect, one of nonsuit, and therefore not one upon the merits: *Denver etc. Ry. Co. v. Iles*, 25 Colo. 19, 53 Pac. 222.

It is no more than a conclusion that in that particular application the applicant has failed to establish the necessary facts to entitle him to a patent, the same as a judgment of nonsuit would be directed in an action at law where the plaintiff had failed to establish the facts upon which he relied to entitle him to the judgment demanded. The fact that a protest had been filed does not change the rule, when, as in this case, the rights of the protestants were neither involved nor adjudicated. Many authorities are cited by counsel for appellant, in which it has been held that the findings of fact made by the department of the interior are conclusive upon the courts. In all these cases the question involved was the authority of the courts to redetermine questions of fact already determined by the department, where parties either based their right upon a muniment of title issued by the government, which had been annulled, or were attempting to show that the facts upon which a patent had been issued were different from those necessarily established before the department upon which it based its action. This is not the case at bar. Appellees are not asserting any ⁴⁸² rights to the premises in dispute by virtue of the canceled receiver's receipt, by attempting to show that the findings of the department, that no discovery of mineral had been made upon the Ophir at the time of their former application, were not justified, but have instituted another proceeding to procure patent, which may be likened to a new action after having suffered judgment of nonsuit, and hence the authorities cited are not in point.

Our attention has not been directed to any case where the question here involved has been directly decided, but we think the rulings of the department of the interior fully sustain our conclusion that the cancellation of a mineral entry only is not

res adjudicata on another application for patent, and that the facts found, upon which such action is based, are not admissible to support an adverse claim against a second application for the same premises. In *Branagan v. Dulaney*, 2 Land. Dec. Dept. Int. 744, Secretary Teller, in speaking of the rights of the locator of a mining claim, says: "The government gives the possessor of a lode his choice, to hold it without patent, or to take patent. If he attempts to take a patent, and finds that he is met with obstacles not anticipated, he may relinquish his attempt to secure patent, and continue to hold by right of possession. Thus, when the applicant to enter a lode claim is met with an adverse claim, he may, if he chooses so to do, avoid a legal conflict by dismissing his application for a patent, and rely on his title by possession given him by the local laws and customs, and a compliance therewith."

In the case of the Clipper Mining Company, 22 Land Dec. Dept. Int. 527, it appears that certain parties applied for a patent on a placer claim, against which a protest was filed, upon the theory that the land embraced in the application was not placer. This protest was sustained, the department finding, as a matter of fact, that the ground was not subject to location as a placer mining claim. Afterward lode claims were located within the limits of the placer, upon which applications for patent were made. The owners of the placer ⁴⁸³ filed an adverse claim against the issuance of patent to the lode claims, in which they set up their old placer title; the applicants moved to dismiss, because a judgment had already been rendered by the land department that the ground claimed as a placer could not be held as such, and the department refused to dismiss the adverse claim of the placer claimants, which was affirmed by the secretary of the interior. While the judgment of the latter seems to have been based largely upon the proposition that the adverse claim ousted the department of jurisdiction, the secretary, in his opinion, said: "It is contended by counsel for applicant that the judgment in the Searl placer was a complete and final adjudication; that the land embraced therein was not placer ground, and could not be entered as such; hence, the adverse claim filed by Searl et al., based, as it is, upon land for which application for patent has been rejected, ought not to be accepted by the department as a legal or proper adverse claim, and its application should be received and patent issue notwithstanding. . . . The judgment of the department in the Searl placer case went only to the extent of rejecting the

application for patent; the department did not assume to declare the location of the placer void, as contended by counsel, nor did the judgment affect the possessory rights of the contestant to it."

In the case of *McGowan v. Alps Cons. Min. Co.*, 23 Land Dec. Dept. Int. 113, the secretary of the interior, in speaking of the effect of the cancellation of a mineral entry, said: "The fact that the entry was canceled would not, of itself, render the ground subject to relocation. The original location of the lode was not affected by the cancellation, even though it had been regular, and the owner could still hold it under its possessory right, so long as there was a compliance with the requirements of the law."

The fair inference from these rulings is, that the judgment of the department, rejecting an application for patent and ⁴⁸⁴ nothing more, leaves the applicant with the same rights as though no application had ever been made.

The trial court excluded appellant's original certificate of location on the Tecumseh, which bore date May 3, 1892, was recorded May 6th of the same year, and claimed a discovery on April 18th preceding. The evidence was undisputed that no discovery of mineral in place, such as the law contemplates, was made upon the Tecumseh until April 20, 1894, at which time appellant relocated the premises and filed a certificate of location. His counsel contend that the original location certificate should have been admitted, because a discovery having been made in the spring of 1894, it would relate back to the date of the original location. The validity of the location of a mining claim is made to depend primarily upon the discovery of a vein or lode within its limits: U. S. Rev. Stats., sec. 2320. Until such discovery, no rights are acquired by location. The other requisites which must be observed in order to perfect and keep alive a valid location are not imperative, except as against the rights of third persons. If the necessary steps outside of discovery are not taken within the time required by law, but are complied with before the rights of third parties intervene, they relate back to the date of location, but not so with discovery; for it is upon that act that the very life of a mineral location depends, and from the time of such discovery only would the location be valid, provided, of course, that others had not previously acquired rights therein: *North Noonday Min. Co. v. Orient Min. Co.*, 6 Saw. 299, 1 Fed. 522.

Under this rule the original certificate of the Tecumseh was properly excluded, for the rights of appellant to the disputed premises only dated from April 20, 1894.

Other errors assigned upon the admissibility of evidence are argued, but as they are manifestly untenable they will not be noticed in detail.

Errors are assigned upon the instructions given by the court and also upon certain instructions requested by counsel for appellant, and refused. Those relating to the instructions ⁴⁸⁵ given will be first considered. The correctness of the charge of the court defining veins is challenged. On this subject the jury was advised, in effect, that a vein is a continuous body of mineral bearing rock, containing precious metals in appreciable quantities, with defined boundaries in the general mass of the mountain; that, theoretically, it must have two walls, but that it was not absolutely necessary that they be disclosed; that their presence would be strong evidence of the existence of a vein, but that the boundaries of the vein might be ascertained by tests, which would distinguish the rock or other substance carrying precious minerals from the rock inclosing it, which did not. The criticism of the foregoing is, that the definition of a vein as therein given was not applicable to the facts, and authorized the boundaries of a vein to be established by assays alone. On behalf of appellant it is claimed there were three well-defined fissures of the Tecumseh disclosed in as many different shafts. It is conceded that on the Ophir a vein with defined boundaries was disclosed in the discovery shaft at a depth of about thirty-four feet. It was located prior to the Tecumseh. The important question upon which the rights of the parties hinged was, Upon which claim was the first discovery made? In determining this fact, it was impossible to ascertain whether the vein of the Ophir was first disclosed near the bottom of the discovery shaft, or at a point about twenty feet from the surface. Witnesses for appellees had testified to the existence of the vein at this latter point, or to conditions which, if believed by the jury, from which its existence at this locality in the shaft might be inferred, although it appears that defined boundaries of the vein were not visible at this place. Many definitions of veins have been given, varying according to the facts under consideration. The term is not susceptible of an arbitrary definition applicable to every case. It must be controlled in a measure, at least, by the conditions of locality and deposit: *Cheesman v. Shreeve*, 40 Fed.

787. The distinguishing feature between a vein and the formation inclosing it may be visible; it must ⁴⁸⁶ have boundaries, but it is not necessary that they be seen; their existence may be determined by assay and analysis: *Cheesman v. Shreeve*, 40 Fed. 787; *Hyman v. Wheeler*, 29 Fed. 347; *Iron Silver Min. Co. v. Cheesman*, 116 U. S. 529, 6 Sup. Ct. Rep. 481.

The controlling characteristic of a vein is a continuous body of mineral bearing rock in place, in the general mass of the surrounding formation. If it possess these requisites, and carries mineral in appreciable quantities, it is a mineral bearing vein, within the meaning of the law, even though its boundaries may not have been ascertained. The instructions of the trial court recognized the different conditions which should be considered in establishing the existence of a vein applicable alike to the veins claimed to be disclosed upon the respective mining claims. On the property of appellant, it was asserted that the walls of the vein were visible; on that of appellees, the vein was claimed to have been discovered about twenty feet from the surface, although at that point neither wall was disclosed; so that, taking into consideration the conditions which the respective parties asserted, and upon which they relied to establish the existence of a vein upon the respective properties, the charge of the court on this subject was correct.

Appellant contends that certain instructions requested upon his behalf, which were to the effect that the discovery shaft upon a mining claim must show a well-defined crevice, should have been given. This contention is based upon the proposition that the vein of the discovery shaft must be plainly visible. From what we have already said, regarding the definition of "veins," and how their existence may be determined, it is clear that the instructions requested, which sought to inject into the case the theory that a vein could not be said to be discovered unless its boundaries were disclosed, were properly refused.

The southwest corner post of the Tecumseh was not placed where it fell by right, because, it was claimed, that point was impracticable. The evidence establishes that this corner fell upon a railroad embankment. It is claimed by ⁴⁸⁷ counsel for appellant that the court instructed the jury to the effect that unless it was found from the evidence that the true southwest corner of the Tecumseh fell upon precipitous ground, and within the rails of the railroad occupying such embankment, or so near to one or the other of them that the erection of a post at that point would be interfered with by the passage of

trains, that it was the duty of appellant to set his post at the true corner.

The instruction referred to is not happily worded, but it must be read as a whole, and also in connection with the one immediately following, from which it is apparent that the court directed the jury that appellant was required to place the southwest corner post of the Tecumseh lode at its true point, unless the evidence established that such point fell where it was impracticable to maintain it. Aside from these considerations, appellant is not in a position to complain of this instruction. It does not appear that the erection of a stake at the true corner would have been interfered with by the passage of trains. The most that can be said is, that the true corner fell upon a railroad embankment twelve or fifteen feet in height. The statute provides that when one or more of the posts which must be erected for the purpose of marking the surface boundaries of a mining claim "fall by right upon precipitous ground, where the proper placing of it is impracticable, or dangerous to life or limb, it shall be legal and valid to place any such post at the nearest practicable point, suitably marked, to designate the proper place": 2 Mills' Annotated Statutes, sec. 3153. These provisions concerning the placing of witness stakes cannot be invoked when the setting of a stake at the true corner is merely difficult or inconvenient: *Croesus Min. etc. Co. v. Colorado Land etc. Co.*, 19 Fed. 78; *Taylor v. Parenteau*, 23 Colo. 368, 48 Pac. 505.

It certainly was not dangerous to life or limb to set this post at its true point upon a railroad embankment, and it does not appear that to have done so was impracticable; so that if the instruction was susceptible of the construction claimed, it was correct, in that the post should have been erected at ⁴⁸⁸ its true point, unless that point was in such proximity to the rails that it would be interfered with by the passage of trains. In this connection, we notice another point, although we do not wish to be understood as definitely deciding it. The statute above quoted provides that where the conditions exist which authorize the placing of a boundary post at a place other than where, by right, it belongs, that it shall be "suitably marked to designate the proper place." This requirement is for the purpose of designating where the true point or corner is which is evidenced by such post, and that it shall be so marked as to impart this information. In this case, it appears that the only marks upon the southwest corner post

of the Tecumseh were, "W. C. 4-9005." These marks certainly did not indicate by either course or distance where the true southwest corner of the claim would be found.

At the conclusion of the introduction of the evidence, the jury was directed to visit the premises in dispute. Objection is made to the instruction of the court to the jury on this subject, in that it was to the effect that the object of this view was to enable a better understanding and comprehension of the testimony of the witnesses respecting the issues involved, but that the verdict must be based upon the evidence introduced before the court. The contention of counsel for appellant is, that the information gained by the jury in visiting the premises should have been treated by that body as substantive evidence. It is well settled, by numerous decisions of this court, that although instructions need not be preserved by a bill of exceptions, yet, unless in an appropriate way an exception to an instruction is made in the court below, so that its attention is directed to the error of law complained of, this court will not review instructions which the trial court was given no opportunity to correct: *Keith v. Wells*, 14 Colo. 321, 23 Pac. 991; *Edwards v. Smith*, 16 Colo. 529, 27 Pac. 809; *Supreme Lodge K. of H. v. Davis*, 26 Colo. 252, 58 Pac. 595; *Denver etc. Ry. Co. v. Ryan*, 17 Colo. 98, 28 Pac. 79.

At the conclusion of the instructions given by the court of its own motion, which embraced the one under consideration, ⁴⁸⁹ an exception in this form was preserved: "To the giving of which instructions, and to each and every thereof, the plaintiff by his counsel then and there duly excepted." This is equivalent to saving an exception to each instruction separately, but it cannot avail as against any instruction to which it is directed, which contains a correct statement of the law, because it is insufficient to point out that which is incorrect from that which is correct.

Without attempting to state fully the instruction which contains the direction of which appellant complains, it is sufficient to say that it embraces other distinct statements of law, which are manifestly correct. Therefore, the exception noted was wholly insufficient to present the question for review, which it is now sought to have us pass upon and determine.

Other objections are urged to the instructions given, which, from the views expressed, we are of the opinion are not well taken, and we do not deem it necessary to notice them at length. Some of the instructions requested by appellant, and

refused, it is apparent from what we have already said, were not correct statements of the law, and, as to the remainder, they were embodied in those given.

The remaining questions presented by counsel for appellant were raised upon a motion for a new trial, and may be considered under the following heads: Irregularity in summoning talesmen; misconduct of officers in summoning these talesmen; misconduct of guide selected by appellees; misconduct of jury; failure of jury to properly view premises in dispute; insufficiency of evidence to support verdict; newly discovered evidence.

The district court of El Paso county is conducted under two divisions, in one of which civil causes are tried and in the other criminal. It is the custom to assign certain jurors of the regular panel to each division. When this cause was called for trial, appellees demanded a jury of twelve. The number of jurors in attendance on the division in which the case was pending not being sufficient from which to select that number, the court, instead of calling jurors from the ⁴⁹⁰ criminal division, directed a certain number to be summoned by open venire. From the persons thus summoned, and those of the regular panel in attendance on the division in which this cause was tried, the jury was selected. After verdict, objection to the action of the court in summoning talesmen was made for the first time, when it was sought to show that the jurors in attendance on the criminal division were not employed or needed when the jury in this case was impaneled. Appellant is not in a position to raise any question regarding the action of the court in directing the issuance of an open venire. The exercise of reasonable diligence upon his part would have disclosed the apportionment of the jurors between the two divisions of the court, and if the conditions were such that he could have properly insisted on having jurors called from the division engaged in the trial of criminal causes, who were then not actually upon any jury, before talesmen could be placed in the box, it was his duty to call the attention of the court to this fact. Having failed to do so, any error in this respect is waived. It is not necessary, however, to place the decision of this question upon this ground alone. The apportionment of the regular panel between the two divisions of the court was entirely in the control of the judges; their action in this respect cannot be interfered with; they make the apportionment in view of the

expected need of jurors in the different divisions; if it turns out that they were mistaken in their action, it will not be inquired into for the purpose of ascertaining whether a proper apportionment was made or not. It was evident that a jury of twelve could not be selected from the regular panel attending the division in which this cause was tried; the judge directed an open venire for a sufficient number for this purpose. This, in the exercise of his discretion as to how and when talesmen may be summoned, he had the clear right to do: 3 Mills' Annotated Statutes, sec. 2609; Laws 1891, sec. 4, p. 250.

It is claimed that the sheriff packed the jury in this case, in the interest of appellees. This charge is based substantially upon these facts: It appears that the sheriff, or his ⁴⁹¹ office, received notice that a special venire for jurors would be issued; from what source this information was obtained is not disclosed; that persons, part of whom hold commissions as deputies, were requested by the sheriff, or his official employes, to be at the sheriff's office on the morning the venire issued, but prior to its issuance, who were afterward summoned as talesmen, and called into the jury-box. One of these deputies, not selected as a juror, was afterward detailed as the bailiff, specially in charge of the jury in this case. There is not a word of evidence that the sheriff or anyone connected with his office, or that either of the persons summoned as talesmen, was biased against the appellant, or took any steps, directly or indirectly, to influence the jury selected to try this cause. In our opinion, there is not the slightest reason to impugn the integrity of the sheriff, or those acting under him, in this matter.

While the jury was engaged in viewing the disputed premises, the guide selected by the appellees pointed out to the jurors the place where, he claimed, the southwest corner stake of the Tecumseh would fall, by right. It seems that he had previously made a survey of the premises. This action on the part of the guide was wrong, and directly contrary to the instructions of the court; but the attention of the court was called to this matter previous to argument, whereupon the jury was directed to disregard what was said by the guide regarding the proper place for this stake, and told that upon this point nothing could be considered except the evidence introduced in the courtroom and upon the trial. This declaration of the trial judge was right, clear,

and emphatic, and we cannot assume that men who had taken a solemn oath to obey the instructions of the court would disregard this plain, authoritative statement regarding their duty.

The misconduct of the jury is based upon the fact that one of the jurors, after the cause was submitted, was separated from his fellows. An affidavit of this juror and the bailiff fully explains the reason of one separation, but it is ⁴⁹² insisted that this is not the one established by affidavits filed in support of this ground of the motion for a new trial. According to one of these affidavits, the juror was in a room by himself, and during that period some unknown person was standing in the door of this room, who, upon seeing the affiant, turned and walked away. Much stress is laid upon the fact that during these separations the juror was seen alone in company with the bailiff, who had originally been summoned as a talesman. The mere separation of a jury, after the submission of a cause, is not per se sufficient for setting aside the verdict and granting a new trial. It must appear that by reason of such separation there is a strong probability that the jury has been tampered with, or improperly influenced to return the verdict which is sought to be set aside: *Dozenback v. Raymer*, 13 Colo. 451, 22 Pac. 787.

There is nothing in the facts established by the affidavits that the jury or any member had been tampered with, or that any effort was made in this direction. Citizens who are required to render services in the determination of disputes between litigants should not be charged with a disregard of their duty or their oath, nor will the courts assume that they have been guilty of such conduct, unless the facts upon which such a charge is based warrant that conclusion.

The facts upon which counsel for appellant rely in support of the claim that the jurors did not properly view the premises are to the effect that all of the jurors did not go down the Tecumseh discovery shaft; that one of the bailiffs stated to the jurors that those who did not care to go down the shafts of either the Ophir or Tecumseh need not do so; that two of the jurors did not view or examine either shaft, and that only one went down the shaft of the Ophir. In suits involving the title to the right of possession of a mining claim, it is made the duty of the court, upon the application of either party, to send the jury in a body to view and inspect the premises in dispute. Each party may select a guide to be approved by the court, who shall be authorized to point out

⁴⁹³ such features as it is desirable that the jury should see: Mills' Code, sec. 188a. In the case at bar, the jurors were not directed to examine any particular portion or feature of either claim. According to the directions of the court on this subject, that was left to their discretion. We are not prepared to say that a litigant in a mining suit may not have the right to have the jury specially directed regarding the examination, but no such request was made by appellant in this case; and therefore, while it may have been proper that the jurors should each have examined the shafts upon the respective properties, the appellant, having failed to request the court to so direct, is not in a position to complain because the jury, in the exercise of its discretion, only examined such features as, in its judgment, after having heard the testimony, were desirable for the purpose of aiding a better understanding and application of the evidence.

It is also urged that the evidence is insufficient to support the verdict, because as to some of the issues there was no evidence to sustain them, and as to others it was false and fabricated. We shall not attempt to give an abstract of the evidence upon which the jury determined the questions of fact involved in this case. It is sufficient to say that there is evidence tending to prove every material issue tendered by the appellees. Whether some or all of this evidence was false was a matter purely within the province of the jury; the witnesses were present in court; their alleged inconsistent statements was a matter for the jury to consider in passing upon their credibility. In this condition of the record, we cannot disturb the findings of the jury.

The newly discovered evidence upon which appellant bases his right to a new trial was evidence, so it is claimed, which would have impeached the credibility of one of the important witnesses of the appellees. It does not appear that if this witness had been impeached it would have changed the result. There were other witnesses testifying to the same matters he did. Newly discovered evidence which only goes to impeach the credit or character of a witness is not sufficient ground ⁴⁹⁴ for a new trial, except it is clear that such impeachment would have resulted in a different verdict: *Christ v. People*, 3 Colo. 394.

The judgment of the district court is affirmed.

ON PETITION FOR REHEARING.

PER CURIAM. The conclusion announced, that the plea of *res judicata* interposed by appellant was insufficient, and that the judgment pronounced by the land department in the protest proceedings therein referred to was not competent evidence, in no manner conflicts with the decision in *German Ins. Co. v. Hayden*, 21 Colo. 127, 52 Am. St. Rep. 206, 40 Pac. 453. In that case, the right of the appellees to recover depended upon the fact that the insured was vested with the title in fee to the land upon which improvements destroyed by fire were situate. At the time the contract of insurance was entered into the assured had obtained a receiver's receipt for these premises. Subsequently, and prior to the loss, this receipt was canceled, and it was held that this action of the department was conclusive that the character of title which the insured exacted should be vested in the insured did not exist. In the case at bar, the appellees, when their entry was canceled, fell back upon the possessory rights initiated by the steps which they alleged had been taken in locating the premises in dispute. This they had a clear right to do, and therefore, in establishing the facts regarding these steps, they were not impeaching the judgment canceling the receiver's receipt.

Another important element necessary to constitute an estoppel in pais is, that the party to whom the statement was made which it is sought to make the basis of an estoppel was ignorant of the truth of the facts to which such statement relates: *Patterson v. Hitchcock*, 3 Colo. 533.

It does not appear from the plea interposed as an estoppel in pais that appellant was ignorant on the subject of the existence or nonexistence of a vein in the Ophir shaft. The ⁴⁹⁵ plea in question contains no direct averment upon this point or any from which the inference could be fairly and reasonably deduced that appellant had no knowledge as to what was or was not disclosed in the Ophir shaft, in the way of a vein. For this reason, it does not appear that he has been misled by the statements attributed to appellee Cone. For the same reason, it does not appear that the silence of Cone misled him to his injury.

For a better understanding of the reasons why the ruling of the trial court, in excluding appellant's original certificate of location on the Tecumseh, was correct, the following facts should be borne in mind: The location of the Tecumseh under the discovery alleged to have been made on April 20, 1894,

was upon a discovery at an entirely different point from the discovery shaft upon which the original location was based. Under the new location a new discovery shaft was adopted. It became, in effect, an original location. The statute which permits amendatory or additional certificates to be filed provides that the filing of such a certificate shall not preclude the claimant under it from proving such title as he may have held under the original location certificate: *Mills' Annotated Statutes*, sec. 3160. For this reason the original certificate may, under certain conditions, be admissible. Such conditions, however, do not exist in the case at bar. Prior to the discovery alleged to have been made upon which the second location is based, no right to the premises in dispute was vested in appellant which entitled him to hold the ground as against third parties, because no discovery of mineral had been made before that time. A location without a discovery carries with it no rights: *Upton v. Larkin*, 5 Mont. 600, 6 Pac. 66. The acts to establish a location which appellant had performed prior to the discovery in April, 1894, would have taken effect, in so far as they could have been utilized, as of the date of such discovery: *Erwin v. Perego*, 93 Fed. 608. Appellant, however, did not rely upon any of these acts, but filed a new location certificate, including ground the boundaries of which were different from that described in the original certificate. ⁴⁹⁶ This was a new location under a new and distinct discovery, and the act of filing a new certificate under this state of facts was a complete abandonment of all rights which may have attached to the steps taken under the original location. The appellees at all times relied upon a discovery claimed to have been made in the discovery shaft of the Ophir. Even if there was no mineral disclosed in this shaft at the time they filed their location certificate, the subsequent discovery which they claimed to have made in this shaft made this location valid, except as against intervening rights, from that date: *Erwin v. Perego*, 93 Fed. 608. They never filed any other certificate, and the original certificate of the Ophir was, therefore, properly admitted.

On the trial below appellees offered in evidence samples of rock purporting to come from the discovery shaft of the Tecumseh, which they claimed did not contain mineral. In rebuttal, appellant produced a sample claimed to have been taken from a crevice in this shaft. This evidence was excluded on the ground that it was not rebuttal. "Rebut-

ting evidence is defined to be that which is given to explain, repel, counteract, or disprove facts given in evidence by the adverse party. It is a general rule that anything may be given as rebutting evidence which is a direct reply to that produced on the other side": 19 Am. & Eng. Ency. of Law, 1093. Appellant had offered evidence in chief tending to prove the existence of mineral in the discovery shaft of the Tecumseh. To meet this evidence appellees had introduced samples from this shaft. As against this evidence, the offer of appellant was not rebuttal. It was nothing more or less than evidence which would have tended to prove the existence of a vein in the Tecumseh shaft, and would properly have been admissible in chief, but was in no sense rebuttal, for it did not tend to prove that the samples received in evidence on behalf of appellees were, in fact, mineral bearing, or did not come from the Tecumseh.

In instructing the jury on the subject of marking the surface boundaries of a lode claim, the court, in instruction No. 17, 407 inter alia, stated: "Where, in marking the surface boundaries of a claim, any one or more of such posts shall fall by right upon precipitous ground, where the proper placing of it is impracticable or dangerous to life or limb, it shall be legal and valid to place any such post at the nearest practicable point, suitably marked, to designate the proper place."

Immediately following this instruction, and upon this subject, the court further stated:

"18. Upon that point the court instructs you that unless you find from the evidence that the southwest corner of the Tecumseh claim fell upon precipitous ground, and within the lines of the rails of the Florence & Cripple Creek Railroad, or so near to one or the other of them, that the erection thereof would be interfered with by the passage of trains, and was, for that reason, impracticable, then you are instructed that it was the duty of the plaintiff to set his post at such corner. If, upon the other hand, you should believe that the proper place of such stake was within the lines of the rails of said road, then you are instructed that under the statute such witness corner shall be set at the nearest practicable point. Whether this was done you are to determine from the evidence in the case, and unless you should believe, in that event, that the said witness corner was set substantially at the nearest practicable point, the marking of said claim would be invalid."

"19. In this connection the court instructs you that if you believe from the evidence that the southwest corner of the Tecumseh lode fell by right on the roadbed of the Florence & Cripple Creek Railroad, and that such point was precipitous ground, where the proper placing of such corner was impracticable, and that plaintiff placed such cornerstone at the nearest practicable point, suitably marked to designate the proper place, then such corner was sufficient and valid."

It will be observed that these instructions follow each other; that 18 refers to the part of 17 above quoted, and that in 19 what is there stated on the subject is preceded by the statement "in this connection," so that while the instructions ⁴⁹⁸ are numbered, they are so intimately connected and refer one to the other that the jury must have understood that they were to be read as a whole. When so read, the thought expressed by the trial court is to the effect that appellant was not excused from placing the southwest corner post of the Tecumseh lode at its true point, unless it appeared from the evidence that such point fell where it was impracticable to maintain it.

Counsel for appellant contend that, under instructions given and refused, the jury was precluded from considering the admitted fact, that veins were exposed in two different shafts upon the Tecumseh, designated 2 and 3. What we said in the original main opinion on this subject is withdrawn. In considering this question, these facts must be borne in mind: Whether or not a mineral bearing vein was disclosed in the discovery shaft upon which the present location of the Tecumseh is based was controverted. No location was made upon either of the discoveries in shafts 2 and 3. The proposition of counsel for appellant is, that if a well-defined crevice, although not bearing mineral in appreciable quantities, is exposed in the discovery shaft, the claimant may rely upon discoveries in other shafts within the boundaries of his claim which disclose the mineral necessary to constitute technical veins.

No question is raised regarding the validity of our statute relative to the location of mining claims. In order that there may be no mistake as to the position of counsel on this subject, we quote from their original brief, as follows:

"If the discovery shaft contains a well-defined crevice, thus giving all the appearance of a discovery, the claimant may rely upon other shafts within the boundaries of the claim for his

discovery of the mineral necessary to constitute technical veins. The state statute does not provide what the well-defined crevice shall contain, while the act of Congress makes no provision as to what shaft the vein required shall be in. Reading and applying the two statutes together, we submit that the well-defined crevice must be in ⁴⁹⁹ the discovery shaft, and the mineral bearing vein may be found in some other shaft upon the claim."

And also from their reply brief, in support of their petition for a rehearing, the following:

"We come now to the question as to whether the entire right to a claim, in so far as the same depends upon a discovery of a well-defined crevice (as required by the state statute) and the discovery of a vein (as required by the act of Congress) is wholly dependent upon the discovery shaft."

"We have not questioned the validity of our state statute. It is not necessarily, when properly construed, in conflict with the act of Congress. Both the state statute and the act of Congress can be given effect, and they should be so construed as to accomplish this."

"We have not maintained that a discovery shaft can be altogether dispensed with. Neither have we maintained that when the state statute in regard to such crevice has not been literally complied with, we can go outside of the discovery shaft for the technical lode or vein, the discovery of which, within the limits of the claim, is required by the act of Congress."

The statute of this state, which designates what shall be disclosed in the discovery shaft, provides that it shall disclose a well-defined crevice at the depth of at least ten feet from the lowest part of the rim of such shaft, at the surface: Mills' Annotated Statutes, sec. 3152. It being conceded that the laws of this state relative to the requirements of a discovery shaft are valid, it appears to us that the proposition upon which counsel rely is not tenable. If, as stated, the state statute is legal, it necessarily follows that the discovery shaft must expose the vein upon which the location is based, or at least disclose one, and therefore the mere discovery of some other vein within the limits of the claim cannot supply the absence of the one required to be exposed in the discovery shaft. In other words, the proposition of counsel for appellant cannot be upheld, unless the state statute is declared ⁵⁰⁰ invalid, and the admission upon their part that it is

not relieves us from the necessity of determining the effect of discoveries in shafts 2 and 3 of the Tecumseh.

"Crevice," as employed in the statute relative to a discovery shaft, clearly means a mineral bearing vein. It was so held by this court in *Bryan v. McCaig*, 10 Colo. 309, 15 Pac. 413. The circuit court of the United States for the district of Colorado has adopted the same view: *Van Zandt v. Argentine Min. Co.*, 8 Fed. 725; *Terrible Min. Co. v. Argentine Min. Co.*, 89 Fed. 583; *Cheesman v. Shreeve*, 40 Fed. 787.

Under these decisions, coupled with the admitted legality of the state statute, the fact that discoveries were made in shafts 2 and 3 upon which no locations were made does not in any manner affect the validity of the Tecumseh.

It is asserted that the evidence is insufficient to establish the fact that the assessment for the year 1897 was performed on the Ophir. A witness on the part of appellees testified that he had extended a drift on the Ophir, on account of the assessment work for 1897, a distance of seven or eight feet; that this drift was worth twelve dollars per foot. For this labor appellee appears to have paid the sum of ninety dollars. For additional work he paid for two days' work at the rate of four dollars per day, and later, for further work, eighteen dollars. This, in addition to paying for the powder, fuse, steel, and candles that were used in working the assessment. There may have been some evidence to the effect that the work was not worth the amount paid, but this was a question for the jury to determine, and as it has been determined in favor of appellees, upon evidence sufficient to sustain it, the finding on this subject will not be disturbed.

On the subject of annual labor, the court, by instruction No. 24, directed the jury as follows: "Upon this point the court further instructs you that the law does not presume a forfeiture by the failure to perform annual labor, and the plaintiff claiming that the Ophir lode became forfeited for such reason, the burden of proving that the annual labor was not done thereon is on the plaintiff, and unless he has shown ⁵⁰¹ you, by a fair preponderance of the evidence, that the work was not done, you are to determine that question in favor of the defendants."

The objection urged to this instruction is, that it cast a burden upon the appellant which he was not required to assume. The evidence tended to establish that a valid location of the premises in dispute had been made by appellees.

This location was prior to the only one under which appellant can base any claim. The act of Congress (U. S. Rev. Stats., sec. 2324) provides that a failure to perform the necessary annual work shall render a claim open to relocation, provided the original locators have not resumed work upon the claim after failure and before relocation. The fair construction of this provision is, that as between the locator and the general government, the failure to do the annual assessment work does not result in a forfeiture. In other words, it is not necessary to perform the annual labor except to protect the rights of the locator against parties seeking to initiate title to the same premises. As against such subsequent location, a prima facie case is made on the part of the original locator by showing a valid location: *Hammer v. Garfield Milling Co.*, 130 U. S. 291, 9 Sup. Ct. Rep. 548.

To otherwise express our views, it might be said that, after a valid location, the title thus acquired remains so, whether the annual assessment work is performed or not, until forfeited or abandoned: *Renshaw v. Switzer*, 6 Mont. 464, 13 Pac. 127, 15 Morr. Min. Rep. 345.

It is the location by the new claimant, and not the mere lapse of time, which determines the right of the original locator: *Little Gunnell etc. Min. Co. v. Kimber*, 1 Morr. Min. Rep. 536.

So that a party seeking to initiate a claim to mining premises already legally located must prove that the annual labor thereon has not been performed, in order to establish that the ground so located is subject to location. In so far, then, as the rights of appellant depended upon the failure of appellees to perform the assessment work for 1897, it was incumbent ⁵⁰² upon him to establish this fact by a fair preponderance of the evidence, or, as the court stated, the burden of proof was upon him to show that the work for 1897 was not, in fact, performed: *Hall v. Kearny*, 18 Colo. 505, 33 Pac. 373; *Johnson v. Young*, 18 Colo. 625, 34 Pac. 173; *Hammer v. Garfield Min. Co.*, 130 U. S. 291, 9 Sup. Ct. Rep. 548.

The petition for rehearing is denied.

RES JUDICATA.—A PARTY sought to be bound by a former judgment must have been a party to both actions in the same capacity or character: *State v. Branch*, 134 Mo. 502, 56 Am. St. Rep. 533, 36 S. W. 226; *Morrison v. Clark*, 89 Me. 103, 56 Am. St. Rep. 395, 35 Atl. 1034; note to *Stockton Building etc. Assn. v. Chalmers*, 7 Am. St. Rep. 175, 176.

PLEADING ESTOPPELS is the subject of the note to Tyler v. Hall, 27 Am. St. Rep. 344-349. An estoppel in pais must be specially pleaded: Davidson v. Jennings, 27 Colo. 187, ante, p. 49, 60 Pac. 354.

MINERAL VEINS.—On the continuity and identity of mineral veins, see Butte etc. Min. Co. v. Societe Anonyme etc., 23 Mont. 177, 75 Am. St. Rep. 505, 58 Pac. 111; Fitzgerald v. Clark, 17 Mont. 100, 52 Am. St. Rep. 665, 42 Pac. 273. A vein or lode is a body of mineral or mineral bearing rock within defined boundaries in the general mass of the mountain: See the extended note to McClintock v. Bryden, 63 Am. Dec. 108.

MINING CLAIMS.—ON THE FORFEITURE of mining claims, see Sisson v. Sommers, 24 Nev. 379, 77 Am. St. Rep. 815, 55 Pac. 829; Nesbitt v. Delamar's etc. Min. Co., 24 Nev. 273, 77 Am. St. Rep. 807, 52 Pac. 609, 53 Pac. 178.

MINING CLAIM—DISCOVERY.—As to what amounts to a discovery of a mineral vein, see McShane v. Kenkle, 18 Mont. 208, 56 Am. St. Rep. 579, 44 Pac. 979.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

BAILEY v. PEOPLE.

[190 Ill. 28, 60 N. E. 98.]

CONSTITUTIONAL LAW—RIGHT TO KEEP LODGING-HOUSE.—The right to entertain lodgers in a lodging-house and to fix by contract with them the price to be paid for such accommodation and the number who shall occupy the same room at the same time for sleeping purposes, is a constitutional liberty and also a property right. Any restriction upon or abridgment of such right deprives the citizen of both liberty and property.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW.—The constitutional provision that no person shall be deprived of liberty or property without due process of law means a public, general law, legally enacted, binding upon all members of the community under all circumstances, and not partial or private laws affecting only the rights of private individuals or classes of individuals.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW.—An enactment which deprives one class of persons of the right to acquire and enjoy property, or to contract with relation thereto, in the same manner as others under like conditions and circumstances are permitted to acquire and enjoy property, or contract with relation to it, is not comprehended within the true meaning of the words "due process of law."

CONSTITUTIONAL LAW—GUARANTY OF LIBERTY AND PROPERTY.—A statute arbitrarily discriminating against one class in the transaction of the business of a lawful occupation, and leaving unaffected by such discriminatory enactment other persons, or classes of persons, engaged in acquiring property in a manner not distinguishable in character from that in which the class discriminated against is employed, is in contravention of the constitutional guaranties of liberty and property.

INNKEEPERS.—LODGING-HOUSE KEEPERS are not, in a legal sense, innkeepers, hotel keepers, or boarding-house keepers.

CONSTITUTIONAL LAW—LODGING-HOUSES—POLICE POWER.—A statute providing that not more than a prescribed number of persons shall sleep in the same room in any lodging-house at the same time is unconstitutional, as a discrimination against such houses and in favor of hotels, inns, and boarding-houses, and

cannot be upheld as a legal exercise of the police power, designed as a sanitary measure.

CONSTITUTIONAL LAW—REGULATIONS FOR PRESERVATION OF HEALTH.—Rights of property cannot be permitted to be invaded under the guise of police regulations for the preservation of health, when such is clearly not the object and purpose of such regulations.

T. J. and C. J. Scofield, for the appellant.

H. J. Hamlin, attorney general, C. S. Deneen, A. C. Barnes, and E. J. Smejkal, for the people.

³¹ **BOGGS, C. J.** The act of the general assembly entitled, "An act to create and establish a board of health in the state of Illinois," approved May 28, 1877, in force July 1, 1877 ³² (Hurd's Stats. 1899, p. 1604), was amended by the addition of four sections thereto by an enactment approved April 21, 1899, entitled, "An act to amend an act entitled 'An act to create and establish a board of health in the state of Illinois'"; Hurd's Stats. 1899, p. 1606. Section 15 of the amendatory act provides the state board of health shall have supervision of "all lodging-houses in cities of one hundred thousand inhabitants or more." Section 16 of the amendatory act is as follows: "It shall be unlawful for more than six persons to occupy the same room for sleeping purposes at the same time in any such lodging-house, and no room in such lodging-house shall be occupied for sleeping purposes which does not contain four hundred cubic feet or more of space for each person sleeping therein at the same time." A complaint was filed before a justice of the peace alleging that the plaintiff in error was the landlord of a "lodging-house" at No. 39 Custom House place, in the city of Chicago, and that on the twenty-sixth day of November, 1899, he willfully and knowingly permitted more than six persons to occupy the same room for sleeping purposes at the same time in said lodging-house, in violation of the provisions of said section 16, hereinbefore set out. The plaintiff in error was arrested on a complaint filed with a justice of the peace, tried, and convicted of the offense purported to be set forth in the complaint, and a fine of twenty-five dollars assessed against him. He prosecuted an appeal to the criminal court of Cook county, where, upon a hearing, he was again adjudged guilty and condemned to pay a fine in the sum of one hundred dollars and the costs in the cause. He prosecutes this writ of error to reverse such judgment of said criminal court.

The evidence established, without dispute, that the plaintiff in error kept a lodging-house at No. 39 Custom House place, in Chicago, and on November 26, 1899, permitted nineteen persons to sleep in one room of the said lodging-house, the dimensions of said room being seventy feet in length, sixty-two in width, and thirteen feet ³³ and three inches in height; that there were sixty-four beds in the room, of which nineteen were occupied on the occasion in question.

The only defense presented in the lower court was, that said section 16 was in contravention of the rights guaranteed to the plaintiff in error by the constitution of the state, and therefore void. Propositions of law to that effect were presented to the trial court, but were refused. The action of the court in passing upon the propositions of law is the sole error assigned in this court.

The guaranty of section 2 of article 2 of the constitution of 1870 is, that no person shall be deprived of liberty or property without due process of law. The term "property" includes every interest anyone may have in any and every thing that is the subject of ownership by man, together with the right to freely possess, use, enjoy, and dispose of the same: *Frorer v. People*, 141 Ill. 171, 31 N. E. 395; *Braceville Coal Co. v. People*, 147 Ill. 66, 37 Am. St. Rep. 206, 35 N. E. 62; *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454; *Gillespie v. People*, 188 Ill. 176, 80 Am. St. Rep. 176, 58 N. E. 1007; 19 Am. & Eng. Ency. of Law, 284, 285; *Booth v. People*, 186 Ill. 43, 78 Am. St. Rep. 229, 47 N. E. 698. The privilege of contracting to receive gains and profits for the right to use property granted to another is both a liberty and property right: *Frorer v. People*, 141 Ill. 171, 31 N. E. 395. The right to make a reasonable contract with reference to the use of a thing is an attribute of property and a property right: *Booth v. People*, 186 Ill. 43, 78 Am. St. Rep. 229, 47 N. E. 698. The right to entertain lodgers in a lodging-house, and to fix, by contract with them, the price to be paid for such accommodation and the number who shall occupy the same room at the same time for sleeping purposes, is a liberty and also a property right. Any restriction upon or abridgment of this right deprives the citizen of both liberty and property.

The attorney general insists section 16 of the enactment in question, though it infringes the property right of the plaintiff in error, may be upheld as a proper exercise of the police power. In *Booth v. People*, 186 Ill. 43, 48, 78 Am. St. Rep. 229, 231, 57 N. E. 798, 799, we said: "The state inherently

possesses, and the ³⁴ general assembly may lawfully exercise, such power of restraint upon private rights as may be found to be necessary and appropriate to promote the health, comfort, safety, and welfare of society. This power is known as the police power of the state. In the exercise of this power the general assembly may, by valid enactments—i. e., ‘due process of law’—prohibit all things hurtful to the comfort, safety, and welfare of society, even though the prohibition invade the right of liberty or property of an individual.”

“Due process of law” means a general public law, legally enacted, binding upon all members of the community under all circumstances, and not partial or private laws affecting only the rights of private individuals or classes of individuals. An enactment which deprives one class of persons of the right to acquire and enjoy property, or to contract with relation thereto, in the same manner as others under like conditions and circumstances are permitted to acquire and enjoy property or contract with relation to it, is not comprehended within the true meaning of the words “due process of law,” and is prohibited by the provisions of section 22 of article 4 of the constitution of 1870. The penalties of the section under consideration are leveled against one class—the keepers of lodging-houses. The keeper of a lodging-house is not, in a legal sense, an innkeeper, a hotel keeper or a boarding-house keeper: *Pullman Palace Car Co. v. Smith*, 73 Ill. 360, 24 Am. Rep. 258; 16 Am. & Eng. Ency. of Law, 2d ed., p. 510. Hotel, inn, and boarding-house keepers are given a lien upon the baggage of their guests by paragraph 42 of chapter 82 (*Starr and Curtis’ Annotated Statutes* 1896, p. 2581), and keepers of inns or hotels and keepers of boarding-houses are by the common law answerable under a different rule of liability for the loss of the effects of their guests: 16 Am. & Eng. Ency. of Law, 2d ed., 530-532. Our statute in respect of the liability for the safe custody of the property of guests applies only to landlords and keepers of public inns and ³⁵ hotels, and the keepers of the various places of public entertainment may so conduct their business as that they may bear the relation of an inn or hotel keeper to some of their guests and that of a boarding-house keeper or lodging-house keeper to others; but, nevertheless, lodging-house keepers constitute a class distinguishable from the keepers of other houses of public entertainment, such as hotels, inns, taverns, or boarding-houses. This legislation is directed only against lodging-house keepers. Keepers of boarding-houses, inns, ho-

tels, and taverns do not fall within the purview of its prohibition. If the enactment is a valid one, inn or hotel keepers and the keepers of boarding-houses may lodge seven or any greater number of guests or patrons in the same room, at the same time, for sleeping purposes, as may suit their convenience, subject, only, to the consent of their patrons or guests, without incurring the penalties which, under the provisions of this enactment, would be visited upon a lodging-house keeper, should he allow more than six persons to occupy the same sleeping apartment at the same time. This is to discriminate against the lodging-house keepers as a class, and to deprive them of liberty and a property right which other persons engaged in business of the same general character and similarly conducted may freely exercise without let or hindrance. As we said in *Frorer v. People*, 141 Ill. 181, 31 N. E. 397: "If A is denied the right to contract and acquire property in a manner which he has hitherto enjoyed under the law, and which B, C, and D are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract."

In *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631, an enactment which prohibited the owners and operators of coal mines from making contracts which other owners of property and employers of labor might lawfully make was held unconstitutional, and could not be maintained as a lawful ³⁶ exercise of the police power. The same doctrine was reiterated in *Frorer v. People*, 141 Ill. 176, 31 N. E. 395. In *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454, an enactment which prohibited contracts for the employment of females to work for more than eight hours in any one day in any factory or workshop where clothing, wearing apparel, or articles of a similar nature were manufactured, was held to be partial and discriminatory in character, and void, as contravening constitutional guaranties, for the reason that other manufacturers and their employes, though engaged in other branches of industry, were not forbidden to so contract. In *Harding v. People*, 160 Ill. 459, 52 Am. St. Rep. 344, 43 N. E. 624, an act which made "that an offense if committed by a person engaged in one branch of mining which if done by persons in another branch of the same business is lawful, without any reason for distinction between the two," was declared to be unconstitutional. In *Eden v. People*, 161 Ill. 296, 52 Am. St. Rep. 365, 43 N. E. 1108, we held a statute which made it unlaw-

ful for a barber to follow his ordinary pursuit on Sunday, and which did not place the like restriction on any other class of business, deprived persons following that avocation of property and unjustly discriminated against them, and could not be sustained as a valid enactment under the police power of the state, because of the unequal operation of the law. The doctrine of *Chicago v. Netcher*, 183 Ill. 104, 75 Am. St. Rep. 93, 55 N. E. 707, is, an attempt to deny a property right to a particular class in a community, where all other members of the community are left to enjoy it, is an unwarrantable interference with constitutional rights, whether such denial is contained in a statute or in an ordinance passed under a statute.

The principle which may be deduced from the declarations of this court on the subject is, that an act which arbitrarily discriminates against one class in the transaction of a business of a lawful occupation, and leaves unaffected by such discriminatory enactment other persons or classes of persons engaged in acquiring property in a manner not distinguishable in character from that ³⁷ in which the class discriminated against is employed is in contravention of the constitutional guaranties under consideration.

The attorney general concedes that the term "lodging-house" and the words "inn," "hotel," or "boarding-house" are none of them convertible terms or words, and that a distinction exists between these several institutions and a lodging-house, but he insists that the act, though it has no penalties against the inn or hotel keeper or boarding-house keeper, may be legally enforced against keepers of lodging-houses as a sanitary measure, under the police power. Some lodging-houses, as it is urged, may be, and doubtless are, the recognized abiding places of unclean, diseased, and vermin-infected guests or patrons, who, together with the owners or keepers of the lodging-houses, are wholly indifferent to sanitary conditions, rendering such houses sources of contagious and infectious diseases. But it cannot be asserted that all lodging-houses are of this character; neither can it be said boarding-houses, inns, and hotels are not to be found which shelter the same class of patrons, and whose keepers are likewise indifferent to sanitary conditions. The public health is less endangered by a cleanly and well-conducted lodging-house than by a filthy, ill-managed, disease-breeding hotel or boarding-house. The lodging of more than six persons in any one room in a cleanly lodging-house cannot be condemned, from a sanitary point of view, any more than the lodging of a

like number of guests in one room in a hotel or boarding-house. If intended as a measure to protect health, the act should have been directed against the evil which threatens to introduce sickness or disease, whether found in a lodging-house, boarding-house or hotel, and as its penalties are not so leveled it can but be regarded as partial and discriminatory legislation. In *Frerer v. People*, 141 Ill. 186, 31 N. E. 399, we said: "The police power is limited to enactments having reference to the comfort, the safety, ³⁸ or the welfare of society, and under guise of it a person cannot be deprived of a constitutional right. It is impossible that, under that power, what is lawful if done by A, if done by B can be a misdemeanor, the circumstances and conditions being the same."

If the enactment is not referable to the police power, as being for the preservation of the public health, we would feel constrained to declare it unconstitutional because violative of section 13 of article 4, viz.: "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title." The title of the amendatory act is, "An act to amend an act entitled 'An act to create and establish a board of health in the state of Illinois,' approved May 28, 1877, in force July 1, 1877, by adding thereto four new sections, to be numbered fifteen (15), sixteen (16), seventeen (17), and eighteen (18)." There could be no valid provision in the amendatory act not germane or pertinent to the general subject of the original act, which is, the health and lives of the citizens of the state. If the act was passed for the purpose of the purification of elections, it should be declared unconstitutional on the ground that the subject and object of the legislation were not expressed in the title of the act. Moreover, the rights of property will not be permitted to be invaded under the guise of a police regulation for the preservation of health, when such is clearly not the object and purpose of the regulation.

We are constrained to declare the section of the enactment in question is in contravention of constitutional guaranties and provisions, and therefore inoperative and void.

The judgment will be reversed and the cause will not be remanded.

"DUE PROCESS OF LAW" AND "LAW OF THE LAND" are synonymous phrases. They refer to general, public law, operating upon all alike, and not to partial or private laws: *Harding v. People*, 160 Ill. 459, 52 Am. St. Rep. 344, 43 N. E. 624. Law of the land, when applied to general legislation, means law which embraces all persons who are or who may come into like situation and circum-

stances; when applied to special or class legislation, it means not only law which embraces all persons in like situation, but it means that the classification must be natural and reasonable, not arbitrary and capricious: *Harbison v. Knoxville Iron Co.*, 103 Tenn. 421, 76 Am. St. Rep. 682, 53 S. W. 955. To entitle a statute to recognition as the law of the land, it must embrace equally all persons in like condition, and, if class legislation, it must be natural and reasonable in its classification: *State v. Schlitz Brewing Co.*, 104 Tenn. 715, 78 Am. St. Rep. 941, 59 S. W. 1033.

CONSTITUTIONAL LAW.—THE WORD "PROPERTY," as used in its constitutional sense, signifies not only those tangible things of which one may be the owner, but everything he may have of an exchangeable value, including the right to acquire and dispose of property, and the right to contract: *Harbison v. Knoxville Iron Co.*, 103 Tenn. 421, 76 Am. St. Rep. 682, 53 S. W. 955.

HEIMANN v. KINNARE.

[190 Ill. 156, 60 N. E. 215.]

NEGLIGENCE—WHEN QUESTION OF LAW.—If the evidence is not in conflict, and but one reasonable inference can be drawn from the facts, the question of negligence arising from such facts is one of law, to be declared by the court.

NEGLIGENCE — CONTRIBUTORY — INFANT TRESPASSER.—A trespassing boy, between thirteen and fourteen years of age, of ordinary intelligence, knows as well as a man that a deep pond is not a safe place upon which to go when the ice thereon is broken at the edge and covered with water. If, with the knowledge of such danger, he carelessly and recklessly goes upon such pond and loses his life by drowning, he is guilty of contributory negligence, as a matter of law, and his age does not excuse him.

NEGLIGENCE—CONTRIBUTORY—INFANTS.—If injury to a minor comes from a danger fully comprehended by him and of which he assumes the risk, having the capacity to comprehend and avoid danger, he may be guilty of contributory negligence as matter of law, which will bar recovery for the injury thus received.

Loesch Brothers & Howell, for the appellant.

J. G. Grossberg and C. Peters, for the appellee.

156 HAND, J. This is an action on the case, brought in the superior court of Cook county by the appellee, as administrator, against the appellant, to recover damages for negligently causing the death of his intestate. The declaration contains three counts. The first count charges that **157** the defendant was the owner of certain premises located in said county, on which there was a certain dangerous hole of great depth, to wit, of twenty-four feet, hidden from view, and which was filled with water and covered with ice, on and to which the public

had free access, yet the defendant, well knowing the matters aforesaid, wrongfully and unlawfully kept said hole so insufficiently guarded, covered, and protected, that by reason thereof said intestate, who was using all due care and caution for his own safety, in passing over said premises, without any fault or negligence on his part, unavoidably slipped and fell into said hole, and was then and there drowned. The second count charges that the defendant, being the owner of said premises, had caused a dangerous hole to be made thereon and permitted water to accumulate and remain therein, so that it became and was a nuisance and was dangerous to the lives of children of tender years, incapable of exercising ordinary care and discretion, who might be attracted thereto, and that it became and was the duty of the defendant to cause the same to be drained so as to remove the water therefrom, which he wholly failed and neglected to do; that the water in said hole being partially frozen over, the decedent, a child of tender years and incapable of exercising ordinary care and discretion, was attracted thereto, and without any fault or negligence on his part fell into said hole and was drowned. The third count charges that the defendant, being the owner of said premises, caused a dangerous hole or pit to be made thereon and permitted water to accumulate and remain therein, so that it became and was a nuisance, and was dangerous to the lives of children of tender years, incapable of exercising ordinary care and discretion, who might be attracted thereto; that it was the duty of the defendant to cause said hole or pit to be safely guarded and inclosed, so as to render it reasonably inaccessible to children of tender years; that the defendant neglected and failed to cause ¹⁵⁸ the said hole or pit to be so safely and securely inclosed, and that the same was wholly uninclosed and unfenced, open, and accessible to children; that the water in said hole or pit being partially frozen over, the decedent, a child of tender years and incapable of exercising ordinary care and discretion, was attracted thereto, and without any fault or negligence on his part, or the part of his parents, fell into said hole or pit and was then and there drowned. The defendant pleaded the general issue. A trial resulted in a verdict in favor of appellee for six hundred dollars, upon which verdict, after overruling a motion for a new trial, the court rendered judgment, which judgment has been affirmed by the appellate court for the first district, and a certificate of importance having been granted, a further appeal has been prosecuted to this court.

The defendant introduced no evidence, but at the close of the plaintiff's evidence moved the court to withdraw the evidence from the jury and instruct them to find for the defendant, which the court declined to do, to which action of the court in that behalf the defendant excepted.

The evidence for the appellee shows that on December 25, 1893, the decedent, a boy between thirteen and fourteen years of age, in company with his brother, who was between fifteen and sixteen years of age, went to a clay-hole, known as "Heimann's," located upon a forty acre tract of land situated in the city of Chicago, bounded by Southport, Ashland, Wrightwood, and Diversey avenues, for the purpose of ascertaining if the ice thereon was strong, said hole being about one hundred and fifty feet by two hundred feet in dimensions, and located about one hundred feet from Southport avenue. It was partially filled with water, which was frozen over. As the boys drew near the clay-hole, the decedent started ahead of his brother on the run, and, without stopping, dashed down the incline to the ice about thirty-five feet below, jumped over an open space of water around the edge of the ice, and ran or slid out toward the middle of the ¹⁵⁹ hole or pond, when the ice gave way, and, the water being over his head, before help could reach him he was drowned. The decedent had resided in the vicinity of this clay-hole for a number of years, had been in the habit of fishing and swimming therein during the summer time and skating thereon during the winter, and had skated thereon two days prior to the accident. The brother of the decedent, who was the only one present at the time of the accident, testified: "The time my brother was drowned he was between thirteen and fourteen years old, attended school, and had never worked. My brother swam in this hole. We could not touch the bottom when we were swimming. He used to go to swim in this hole with me or the other boys two or three times a week for a year or more. From the top of the bank it was about thirty-five feet down to the water. There was a hill sloping down. My brother was about twenty-five feet ahead of me. He was running fast. I did not see him go down the bank. The ice was broken around the bank. He had to jump over the water to get on the ice. My brother said to me that morning, 'Come; let's go and see if the ice is strong.' We went there for that purpose. We were outside, snowballing, and he said, 'Let's go and see if the ice is strong.' There was a lot of water on the ice—about one-half inch or an inch, somewhere around an

inch, and sometimes two inches. The water extended from the shore about three or four feet. The ice was not broken—it was just rotten. There was water on it, and the water ran through the ice. It was broken around the shore. It was thin. Out in the middle it was two inches thick. When he got to the ice he slid out on the ice and then he went down.”

If the decedent had been an adult, it is admitted no recovery could have been had under the circumstances of this case, as it is conceded the general rule is that the owner or occupant of land, as against trespassers, is not required to keep his premises in a safe condition, and ¹⁶⁰ that if a person goes upon such premises to gratify his curiosity, or for pleasure, without invitation, express or implied, he does so at his peril, and if injured while so doing, he can only recover for the gross negligence or wanton conduct of the occupant or owner. It is, however, said a child between thirteen and fourteen years of age does not possess the same discretion and judgment as an adult, and that while the decedent may have been a technical trespasser, yet if the owner of said clay-hole left the same exposed and unguarded, and the decedent, by reason of his tender years and inexperience, was attracted thereto for the purpose of skating thereon, a recovery may be had if he exercised such reasonable care as one of his age and capability might be expected to exercise under the circumstances, and that whether he exercised such care is a question to be determined by the jury under the particular circumstances of the case, and not a question of law for the court.

If the evidence be conflicting as to the danger likely to be incurred, or as to the act or acts in the getting in the way or reach of the danger which produces the injury, or as to the age or capability of the child, the question of whether the person injured or killed was guilty of contributory negligence should be submitted to the jury; or if the circumstances of the case, when the facts are undisputed, together with all the natural inferences to be drawn therefrom, are such that ordinarily prudent men would be liable to differ in their views as to the negligence imputed, then the question of negligence should not be determined by the court, but should be left to the jury, under proper instructions; but if the court can say that but one reasonable inference can be drawn from such facts, then the question becomes one of law. In this case there is no conflict of evidence, as the defendant introduced no evidence. The boy was between thirteen and fourteen years of

age. He was in school, and must be presumed to have been of ordinary intelligence ¹⁶¹ for one of his age. He had lived for some time in the vicinity of the clay-hole, had fished and swam therein during the summer and skated thereon during the winter. On the morning of the injury he went to such clay-hole for the purpose of testing the strength of the ice. His remark to his brother, "Come; let's go and see if the ice is strong," shows he was well aware it would be dangerous to go upon the ice unless it was sufficiently strong to bear his weight. The ice was covered with water and broken at the edge. He jumped over the water onto the ice and slid out to a point on the ice where he knew the water was over his head. A boy between thirteen and fourteen years of age knows as well as a man that a pond like this one is not a safe place upon which to go when the ice is broken at the edge and covered with water, and if, with the knowledge of such danger, he carelessly and recklessly goes upon such pond and loses his life, his age cannot excuse him. Such conclusion is so plain and clear that all ordinarily prudent men must arrive thereat from a dispassionate consideration of the evidence in this case.

In 7 American and English Encyclopedia of Law, second edition, page 409, it is said there can be no recovery if the injury came from a danger fully apprehended by the infant, and of which he had assumed the risks, having the capacity to comprehend and avoid danger; and if a minor has reached years of discretion, and is fully capable of comprehending danger and using sufficient care to avoid it, he may be guilty of contributory negligence as a matter of law.

In *Chicago etc. Ry. Co. v. Eininger*, 114 Ill. 79, 29 N. E. 196, which was an action for a personal injury claimed by the defendant to have been inflicted while the plaintiff was attempting wrongfully to climb upon a freight train, the court on page 83 (114 Ill., 29 N. E. 197), say: "There was no evidence as to the age or capacity or discretion of the plaintiff introduced, more than that witnesses spoke of ¹⁶² him as a little boy. He was, however, present in court at the trial. It appeared that he was of such age and ability to care for himself as to be intrusted by his parents to attend school in a large city, at a considerable distance from home, and to go and return by himself. He was at the time on his return from school. There was nothing in the case tending to show that negligence was not imputable to the plaintiff by reason of his incapacity to exercise care, and such a question should not have been submitted,

by instruction, to the jury. The same degree of care might not have been required from the plaintiff as from a person of mature years, but the idea that no negligence at all could be imputable to him was inadmissible."

In *Wabash R. R. Co. v. Jones*, 163 Ill. 167, 45 N. E. 50, a boy eight years and ten months old, while walking upon a railroad track, was run over and injured by a passenger train. It was averred in the declaration on account of his tender years the plaintiff was incapable of caring for his own safety. A judgment for the plaintiff was reversed. It was held the plaintiff was a trespasser, and that it was error to admit evidence that people living along the defendant's track at that place had been in the habit of using the track as a footpath, as the place was one of danger, and that the plaintiff was there at his own risk. To the same effect is the case of *Illinois Cent. R. R. Co. v. O'Connor*, 189 Ill. 559, 59 N. E. 1098, in which case the boy injured was fourteen years of age.

In *Ecliff v. Wabash etc. Ry. Co.*, 64 Mich. 196, 31 N. W. 180, a boy twelve years old, of ordinary intelligence, was killed while riding on a freight train, in front of an engine, which was pulling the train tender foremost, by collision with another engine. There being no conflict in the testimony, the trial court held, as a matter of law, that the boy was guilty of contributory negligence, and directed a verdict for the defendant, which judgment was affirmed by the supreme court.

¹⁶³ In *Masser v. Chicago etc. Ry. Co.*, 68 Iowa. 602, 27 N. W. 776, which was an action brought to recover damages for the death of a boy eleven years of age, who was killed by being run over by a train while playing upon the railroad tracks of the defendant, the court, on page 605 (68 Iowa, 27 N. W. 778), say: "The deceased, then, was a trespasser—at least in the sense that he was upon another's premises where he had no right to be—and being a trespasser, he was guilty of contributory negligence, unless he was a person of such tender years that he should be presumed to have such lack of discretion as to relieve his act of the character of negligence. The plaintiff contends that he was of such tender years; that he should have been so presumed, or, at least, that the jury would have been justified in so finding. But we think otherwise. A boy eleven years of age knows, as well as an adult does, what a railroad is, and the use to which it is put, and the consequence to a person who should be struck by a passing train, and knows that he should not stop to play or lounge amid a network of tracks.

It is true that a boy of that age cannot be presumed to have the judgment of an adult; but it does not require much judgment to keep from walking in a dangerous place, the dangers of which are fully understood. If the question was as to whether the deceased was guilty of contributory negligence in the mere act of stepping backward upon the defendant's track when the Fort Dodge train passed, the case would be different. The deceased evidently lost his presence of mind somewhat, and he might not have been guilty of negligence in what he did then, even though he did not govern himself with the prudence which might reasonably have been expected of an adult. But his negligence consisted in going, in the outset, and in remaining, where he incurred the danger of losing his presence of mind. We certainly cannot hold that a boy eleven years old is exercising reasonable prudence in making such a place as that to which the deceased and his companion went ¹⁶⁴ a playground or lounging place, nor that a jury would be justified in so finding."

In *Nagle v. Allegheny Valley R. R. Co.*, 88 Pa. St. 35, 32 Am. Rep. 413, which was an action to recover for the death of a boy fourteen years of age, the plaintiff was nonsuited, and the court held that it would be presumed the decedent had sufficient mental capacity to recognize and avoid danger, unless there was proof to the contrary.

In *Twist v. Winona etc. R. R. Co.*, 39 Minn. 164, 12 Am. St. Rep. 626, 39 N. W. 402, which was an action to recover for a personal injury to a boy ten and a half years old, of average intelligence, who had frequently been in the vicinity of a railroad turntable, a recovery having been had, the cause was reversed and remanded, with directions to enter judgment for the defendant. On page 628 (39 Minn., 12 Am. St. Rep. 628, 39 N. W. 405) the court say: "The law very properly holds that a child of such tender years as to be incapable of exercising judgment and discretion cannot be charged with contributory negligence. But this principle cannot be applied, as a rule of law, to all children, without regard to their age or mental capacity. Children may be liable for their torts or punished for their crimes, and they may be guilty of negligence as well as adults. The law very humanely does not require the same degree of care on the part of a child as of a person of mature years; but he is responsible for the exercise of such care and vigilance as may reasonably be expected of one of his age and capacity, and the want of that degree of care is negli-

gence. The fact that he may not have the mature judgment of an adult will not excuse a child from exercising the degree of judgment and discretion which he possesses."

The appellee relies upon the cases of *Pekin v. McMahon*, 154 Ill. 141, 45 Am. St. Rep. 114, 39 N. E. 484, and *Siddall v. Jansen*, 168 Ill. 43, 48 N. E. 181. In the *McMahon* case the boy who lost his life was eight years old, and the pool of water in which he was drowned was located immediately adjoining one of the public streets of the city of Pekin, and the city, prior to the ¹⁶⁵ accident, had been notified of the dangerous character of the place where the accident occurred, but had neglected to remedy the same. In the *Siddall* case the child that was injured was but five years old. He was taken by the father, who was in the employ of the defendants, to their place of business, where he was at work. In the temporary absence of the father the child was attracted to an elevator shaft, the door of which was unfastened, and was severely bruised and mangled by the descending cage, near which it was not infrequent that children of other employés and of customers were seen, and there was an ordinance in force in the city of Chicago relative to elevators of the character of the one which injured the plaintiff, requiring catches or fastenings upon the doors thereof, so that they might be opened only from the inside, which had not been complied with by the defendants. The children in these cases, by reason of their tender years, were not conscious trespassers, and the dangers to which they were attracted were located, the one immediately adjoining a public street, and the other in a store building, near which children might lawfully go, and in the first case the city had been notified of the danger and had neglected to remove the same; while in the case at bar the boy who lost his life was between thirteen and fourteen years of age, and was fully conscious of the dangerous character of the place where he lost his life, to which place he voluntarily went several blocks from his home, and at least one hundred feet across private property. The cases relied upon were decided correctly upon the facts then before the court, but they do not control the case at bar.

We are of the opinion the motion of the defendant to withdraw the evidence from the jury and to instruct them to find for the defendant should have been allowed. The judgments, therefore, of the appellate and superior courts will be reversed.

NEGLIGENCE IS A QUESTION OF LAW where the facts are uncontroverted: *Gonzales v. New York etc. R. R. Co.*, 38 N. Y. 440, 98 Am. Dec. 58. If only one inference can be drawn from a given state of facts, whether they constitute negligence is a question of law: *Wade v. Columbia Electric etc. Co.*, 51 S. C. 296, 64 Am. St. Rep. 676, 29 S. E. 233.

CONTRIBUTORY NEGLIGENCE.—A CHILD under fourteen years of age will not be presumed, as a matter of law, to be capable of contributory negligence: *Railroad Co. v. Mackey*, 53 Ohio St. 370, 53 Am. St. Rep. 641, 41 N. E. 980. An infant of fourteen years, however, will be presumed to have sufficient capacity to recognize and avoid danger. If the injury to a child is the natural consequence of his own recklessness, he cannot recover therefor: See the monographic note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 411-413.

THE DEATH OF AN INFANT BY DROWNING in a pond and the liability therefor are considered in *Arnold v. St. Louis*, 152 Mo. 173, 75 Am. St. Rep. 447, 53 N. W. 900.

MAKEEL v. HOTCHKISS.

[190 Ill. 311, 60 N. E. 524.]

RECEIVERS.—THE POWER OF COURTS OF EQUITY TO CONTINUE A BUSINESS under a receiver and to make his charges and expenses a charge upon the property must be exercised with great caution.

RECEIVERS—COSTS OF RECEIVERSHIP AS LIEN.—A receiver's charges, disbursements, and expenses in running the business under receivership cannot be made a lien upon the property superior to the rights of the holder of a deed under a foreclosure sale, where the mortgagee was not made a party to the receivership suit involving only the equity of redemption and the amount realized at the foreclosure sale is sufficient to pay only the mortgage debt and costs.

RECEIVERS—EXPENSES AS LIEN—ESTOPPEL.—If a receiver of property, pending the determination of the ownership of the equity of redemption therein, is made a party only in his individual capacity to a foreclosure proceeding in another court, and files an answer stating that his possession held under a lease, as well as his rights, are subject to the mortgage and decree foreclosing it, he is estopped, after the decree and sale, to assert any lien in his own behalf, superior to the lien of the mortgage.

SUBROGATION IS AN EQUITABLE AND NOT A LEGAL RIGHT, and cannot be enforced when it would be inequitable, or when it would work an injustice to others having equal equities.

C. H. Briggs became the owner of the Alabama Hotel in Chicago, subject to a deed of trust to secure an indebtedness due to E. Hotchkiss. Briggs and M. J. Dunne exchanged properties, whereby the latter became vested with the title to the hotel. This exchange was afterward set aside as fraudulent (*Briggs v.*

Dunne, 168 Ill. 226, 48 N. E. 48), and T. E. Makeel was therein appointed receiver of the hotel, and, on August 1, 1896, took possession, and thereafter, until March 8, 1897, operated the hotel as such receiver, when, it appearing from his report, that it was not paying expenses under the receivership, the court entered an order reciting that the property would be conserved by keeping the hotel open, and that the interests of all parties would be promoted by leasing it to Makeel, individually, until May 1, 1898, for six hundred dollars. Briggs and Dunne thereupon made a lease to Makeel in accordance with the order of the court. Hotchkiss, the mortgagee, was not made a party to the suit, but in January, 1897, prior to the leasing, filed a bill to foreclose his mortgage. He did not make Makeel a party, but claimed the right to have a receiver appointed in such suit. None was appointed, and Hotchkiss gave his written consent to the lease. Makeel, although not discharged as receiver, individually operated the hotel under the lease until May 1, 1898, and thereafter he operated it as receiver until October 17, 1898, when he delivered possession to Annie E. Hotchkiss, who obtained a master's deed to the property by virtue of the foreclosure and sale thereunder. The lease to Makeel recited that his possession was subject to the rights of the foreclosure purchaser, and that he would surrender possession to the person entitled to the master's deed. After the leasing to Makeel, Hotchkiss made him individually a party to his bill to foreclose, and Makeel appeared and filed his answer, in which he stated that he was in possession of the property under a lease, subject to the deed of trust and to the decree foreclosing it, if any should be rendered. After Makeel's lease expired, in May, 1898, and while he was operating the hotel as receiver, he reported to the court in the case of Briggs v. Dunne his receipts and disbursements; and on September 21, 1898, filed his petition claiming as due him for disbursements, in excess of receipts, nine hundred and thirty-six dollars and seventy-six cents, which, together with five hundred dollars allowed him for services, left due him fourteen hundred and thirty-six dollars and seventy-six cents; that Briggs was insolvent; that his equity of redemption had expired; and that no one had any interest in the property except the holder of the certificate of purchase, who would be entitled to a deed about October 1, 1898; that there were no funds out of which to pay such balance or any further amount which might be allowed him. The petition contained a prayer that such balance,

together with any further sum allowed him, should be decreed to be a paramount lien on the premises, and if not paid, that the premises be sold to satisfy such lien. Hotchkiss filed an answer denying that the receiver had any claim which could be made a paramount charge against the premises conveyed under the foreclosure and sale. Plaintiff had judgment and Hotchkiss appealed to the appellate court, which having reversed the decree of the lower court, Makeel took this appeal.

F. W. Young, T. E. D. Bradley, and R. J. Frank, for the appellant.

F. Arnd, for the appellee.

315 CARTER, J. We do not find it necessary in this case to consider the extent of the power of a court of equity when it takes possession, by a receiver, of property used in a business enterprise, and involved in litigation, and carries on such business by its receiver pending litigation, to make the expenses of the receivership a lien upon such property superior to prior liens. That courts of equity have and exercise such power, to a limited extent, in the control and operation of railroads and of other property and business impressed with a public interest cannot now be questioned. But it is a power to be used sparingly and with great caution: *Am. & Eng. Ency. of Law*, sec. 20, p. 392, and cases there cited. It seems also that the same doctrine has been applied in some cases to property of a different character, used in the business of private individuals or corporations, where the expenses of the receivership appeared to be necessary to preserve the property from destruction or waste, and in conserving the interests of those who might succeed in establishing their superior right or title: *Beckwith v. Carroll*, 56 Ala. 12; *Karn v. Rorer Iron Co.*, 86 Va. 754, 11 S. E. 431; *Thornton v. Highland etc. R. R. Co.*, 94 Ala. 353, 10 South. 442; *Highland Ave. etc. R. R. Co. v. Thornton*, 105 Ala. 224, 16 South. 699; *Ellis v. Vernon Ice etc. Co.*, 86 Tex. 109, 23 S. W. 858; *Cake v. Mohun*, 164 U. S. 311, 17 Sup. Ct. Rep. 100.

In *Beckwith v. Carroll*, 56 Ala. 112, it was said: "When it becomes the duty of a court of equity to take property under its own charge, through a receiver, the property becomes chargeable with the necessary expenses incurred in taking care of and saving it, including the allowance to the receiver for his services. He is the officer and agent of the court, essential to its own efficiency in the protection of things so situated, to keep

them under its control until such expenses and allowances are paid or secured to be paid." This was quoted with approval in *Knickerbocker v. McKindley Coal etc. Co.*, 172 Ill. 535, 547, 64 Am. St. Rep. 54, 58, 50 N. E. 330, 334, where it was further said: "The object of appointing a receiver is to preserve the property for the benefit of all ³¹⁶ parties interested. Sometimes this object is best attained by continuing a business. When this is done, the court has the right, although it should exercise such right with great caution, to make the expenses of such business chargeable upon the corpus of the property if the income is not sufficient to pay the same. Of course, such expenses must be charged first upon the net income, but when that is not sufficient they may be charged upon the property itself, or upon its proceeds after sale. It has been held that although this authority of a receiver to incur indebtedness in order to keep the business a 'going concern' until the rights of the parties are adjusted and a sale is effected ordinarily arises only in cases of railroad companies, yet the same rules may be applied in other cases, under like circumstances": Citing *Hopfensack v. Hopfensack*, 61 How. Pr. 498; *Ellis v. Vernon etc. Water Co.*, 86 Tex. 109, 23 S. W. 858; *Espuella Land etc. Co. v. Bindle*, 11 Tex. Civ. App. 262, 32 S. W. 582; *Thornton v. Highland Ave. etc. R. R. Co.*, 94 Ala. 353, 10 South. 442; *Highland Ave. etc. R. R. Co. v. Thornton*, 105 Ala. 225, 16 South. 699.

It is contended by counsel for appellant that what was said in the *Knickerbocker* case is applicable to the case at bar, and should be decisive of it. A careful examination of the case, however, will disclose marked differences between it and the one under consideration. Bearing in mind that the authority contended for is rather an exception to a general rule than a rule itself, and is liable to great abuse even when applied to railroads and other property and business affected with a public interest, and is to be exercised with great caution, it is clear to us that the doctrine contended for cannot properly be applied to the case at bar. In the *Knickerbocker* case the question arose between parties to the suit, where the receiver had been appointed on agreement or on the motion of Gore, who, having died, was succeeded as complainant by *Knickerbocker*, his executor; and it was *Knickerbocker*, the representative of Gore, who objected in that ³¹⁷ case to making the receiver's expenses a charge upon his property. The mortgage on the property was paid in full, and it was not sought to make the

receiver's expenses or obligations for necessities in running the hotel a lien on the property superior to the mortgage lien, but it was the case of intervenors seeking to recover for coal and groceries furnished to the receiver while running the hotel and to have the claim made a lien on the property, which Gore had redeemed from his mortgage by purchasing it at the sale, and it was said in that case that the receiver, who was appointed on the motion of the complainant, was acting as such when the intervenors furnished the supplies. It was further said (172 Ill. 544, 64 Am. St. Rep. 56, 50 N. E. 533): "It was while the receiver was thus, with the consent of the appellants, operating and conducting the hotel, and while the furniture and fixtures were in his possession, as receiver, that appellees furnished to said receiver the supplies in question"; and it was then said: "Such being the facts, what is the law applicable to them?" It was also said in that case that the complainants were estopped from saying that the claimants should not be paid. The case at bar is so different in its material facts from the case referred to that it is not governed by the same equitable principles. In the first place, Hotchkiss, the owner of the mortgage lien, was not a party to the suit between Dunne and Briggs, in which the receiver was appointed, and did not ask for his appointment, but commenced and prosecuted to foreclosure and sale another suit in another court, in which he prayed for a receiver of his own. There was no controversy in the Dunne-Briggs case as to the mortgage lien, but only as to the ownership of the equity of redemption, and the receiver was appointed and directed to run the hotel by the consent and agreement of Dunne and Briggs, and not of Hotchkiss. The amount realized for the property at the master's sale was only sufficient to pay the mortgage debt and costs, leaving nothing whatever for the owners of the equity of ³¹⁸ redemption or to apply on the receiver's charges in the Dunne-Briggs suit. The vested rights of Hotchkiss were not attacked or involved in the case. Only the equity of redemption was in litigation, and, as the facts stood, the costs and charges should have been made a lien and charge on that interest only.

Moreover, we are of the opinion that Makeel is estopped from asserting his right to the alleged lien contended for by him. His agreement with Hotchkiss for the lease to be made to him recited that the premises were subject to the mortgage, and contained a covenant that he would surrender possession

to Hotchkiss, or whoever should be entitled to possession under the master's deed, on the termination of his lease. It also recited that Hotchkiss was entitled to a receiver in the foreclosure suit, but waived that right by the agreement. Then, again, after he took possession under the lease—not as receiver, but as lessee—Hotchkiss amended his bill in the foreclosure suit, and made him, Makeel, a party, and thereupon Makeel filed his answer, in which he averred that he was in possession of the premises under said lease from Dunne and Briggs, subject to said mortgage then being foreclosed in that suit, and that his possession and rights were entirely subject to the mortgage and to the orders and decrees of the court in said foreclosure suit. Replication was filed, and the court found that all the material allegations of the complainant's bill were true; found the amount due him on his debt and decreed it to be a first lien on the premises; that the premises be sold to pay the same, and that upon such sale the master execute and deliver to the purchaser a certificate of purchase, and that at the end of fifteen months the defendants, and all persons claiming under them, be forever barred, and that the master execute to the legal holder of the certificate a deed of conveyance. We are unable to see why the appellant is not estopped by his covenants and answer from claiming in this case, for ³¹⁹ himself, any charge or lien on the property superior to that of Hotchkiss or of the holder of the master's deed. True, he is not claiming anything for the time he held under the lease, but only for the period before the lease and the period after its termination until the premises were surrendered to appellee. Still, he does not claim in any trust or official capacity for another, but only for his own use and benefit for services rendered and for disbursements made. While, as receiver, he was not bound because he did not contract nor answer as such receiver but only in his individual capacity, in so far as he represented the court which appointed him or was the representative or trustee of the interests of others, the estoppel would not arise; but in so far as his own interests are concerned and his right to assert a lien in his own behalf and for his own benefit superior to the mortgage lien, he is estopped by his own acts and covenants—otherwise, in direct opposition to his answer in the foreclosure suit, and to the recitals and covenants in his agreement with Hotchkiss that Hotchkiss had the superior right and that he would surrender possession on the termination of his lease, and upon which Hotchkiss relied and acted, Makeel, for his own profit and

advantage, would be permitted to make his own claim a first lien on the property, and to the extent of the amount of it displace the mortgage lien of Hotchkiss. Surely equity will not permit him to do this, even if the court, in a proper case, had the power to make the cost of the preservation of the property a lien superior to all others.

But appellant contends that to the extent of his claim for disbursements made he is entitled to be subrogated to the rights of those who furnished supplies to him as receiver, and to have the same made a lien on the corpus of the property, superior to the mortgage lien. We think it is a sufficient answer to say that, even if such third persons had the right to such lien, Makeel is not entitled to be subrogated to such right. Subrogation is an ³²⁰ equitable right, and not a legal one, and can be enforced only in equity. It will not be enforced when it would be inequitable to do so or where it would work injustice to others having equal equities. To permit subrogation in this case would not only work injustice to appellee, who succeeded to the title of Hotchkiss, which appellant admitted to be the superior one, but would permit appellant to violate his own contract with Hotchkiss. This equity will not allow: 24 Am. & Eng. Ency. of Law, 191.

It is next contended that it was error in the appellate court to order that appellant's petition be dismissed, as he might have relief against Briggs. It is sufficient to say that no relief against Briggs was asked, but only that the claim, as allowed, be made a first lien on the property and in default of payment that the property be sold, and such was the substance of the order of the circuit court.

The judgment of the appellate court will be affirmed.

RECEIVER.—THE OBJECT OF APPOINTING a receiver is to preserve the property for the benefit of all parties interested, and this object is sometimes best attained by continuing the business, which will be done where the interests of all parties will be best preserved by so doing: *Knickerbocker v. McKindley Coal etc. Co.*, 172 Ill. 535, 64 Am. St. Rep. 54, 50 N. E. 330.

RECEIVERSHIP—CLAIMS AND EXPENSES.—When a court of equity takes charge of property through a receiver, it becomes chargeable with the necessary expenses incurred in preserving it: *Knickerbocker v. McKindley Coal etc. Co.*, 172 Ill. 535, 64 Am. St. Rep. 54, 50 N. E. 330. On the priority of the claims and expenses of a receivership over precedent mortgages, see the monographic note to *Green v. Coast Line R. R. Co.*, 54 Am. St. Rep. 404-409. On the relation of receivers to pre-existing liens, and the remedies for their enforcement, see the monographic note to *American etc. Bank v. McGettigan*, 71 Am. St. Rep. 352-384, and on the power of receivers to create liens, note to *International T. Co. v. United C. Co.*, ante, pp. 72-79.

**CHICAGO TRUST AND SAVINGS BANK v. CHICAGO
TITLE AND TRUST COMPANY.**

[190 Ill. 404, 60 N. E. 586.]

NEGOTIABLE INSTRUMENTS.—NO INSTRUMENT IS A NOTE, either negotiable or non-negotiable, which does not provide for payment absolutely and unconditionally.

NEGOTIABLE INSTRUMENT—WHAT IS NOT.—An instrument by which the maker agrees to pay to the order of the payee a certain sum "on or before one year after date of the completion of the piling and filling," of certain premises, "according to the requirement of a certain agreement of even date therewith, the date of said completion of piling and filling to be determined by the board of commissioners," is not a note and cannot be reissued by the maker, as can a note, nor can such instrument be assigned by simple indorsement.

NEGOTIABLE INSTRUMENTS.—MERE INDORSEMENT DOES NOT OPERATE TO TRANSFER or assign a non-negotiable instrument, nor does the title to such instrument, thus indorsed, pass by mere delivery.

CONTRACTS — CONSTRUCTION. — TWO INSTRUMENTS EXECUTED AS PART OF THE SAME TRANSACTION and agreement, whether at the same or different times, must be taken and construed together as one instrument.

Johnson & Morrill and R. W. Millar, for the appellant.

J. G. Henderson, F. G. Gardner, and Lackner, Butz & Miller, for the appellees.

408 PER CURIAM. In deciding this case the appellate court delivered the following opinion:

"Counsel for appellant contended, and argue with great force, that the agreements (which we shall for certainty refer to as 'note-contracts') held by appellant, having been purchased and not paid by Mr. Cooper, who signed them, he had a right to reissue them, and that the reissue thereof is valid. Whether that be so depends upon whether the instruments in question are promissory notes. Counsel concedes that they are not negotiable promissory notes, but contends that they are of the class of instruments known in our law as non-negotiable promissory notes.

"No contract or agreement is a promissory note, either negotiable or non-negotiable, which does not provide for payment absolutely and unconditionally. If payment depends upon a contingency which may never happen, it is not a promissory note: *Kelley v. Hemmingway*, 13 Ill. 605, 56 Am. Dec. 474; *Smalley v. Edey*, 15 Ill. 324; *Baird v. Underwood*, 74 Ill. 176; *Husband v. Epling*, 81 Ill. 172, 25 Am. Rep. 273.

"We do not understand counsel for appellant to contend that a valid 'reissue' can be made of contracts other than promissory notes.

"A contract for the payment of a certain sum when the payee 'is twenty-one years old' is not a promissory note: *Kelley v. Hemmingway*, 13 Ill. 605, 56 Am. Dec. 474. 'The fact that the payee lived until he was twenty-one years old makes no difference. It was not a promissory note when made.' A promise to pay a definite sum of money 'on the death of a particular individual is a good promissory note, for the event on which the payment is made to depend will ⁴⁰⁹ certainly transpire': *Kelley v. Hemmingway*, 13 Ill. 605, 56 Am. Dec. 474. A contract or agreement in writing to pay a definite sum of money six months after date, 'on condition said amount is not provided as agreed by J. U.,' is not a promissory note: *Baird v. Underwood*, 74 Ill. 176. An agreement in writing to pay a definite sum of money 'when the estate of the said T. M. is settled up' is not a promissory note: *Husband v. Epling*, 81 Ill. 172, 25 Am. Rep. 273. Although it may not be known in advance when the time may be, yet 'it must be absolutely certain that it will be some time': *Canadian Bank v. McCrea*, 106 Ill. 281.

"The note-contracts now here in question, called by the appellant promissory notes and by the appellees contracts, state that 'on or before one year [two years in one of them] after the date of the completion of the piling and filling' of certain premises 'according to the requirements of a certain agreement of even date therewith, the date of said completion of piling and filling to be determined by the board of commissioners of Lincoln park and evidenced by their certificate in writing, . . . and notice in writing served on the payer,' for value received, the payer promises to pay to the order of Minna Allmendinger seven thousand five hundred dollars. It cannot be said that it is absolutely certain that the piling and filling will ever be done, or that it will be done according to the requirements of the agreement referred to, or that the Lincoln park commissioners will ever make the certificate indicated, or that such a certificate will ever be filed with the trustee named.

"Said note-contracts being for the payment of money only upon the happening of the contingent and uncertain events mentioned, not being promissory notes, cannot be 'reissued' by the maker thereof, in the sense or in the mode that a promissory note not then due may be reissued. They are

payable to the order of Minna Allmendinger. It was therefore necessary that there should be a valid transfer thereof to vest the title to the same in any other person. It is not charged that she made any ⁴¹⁰ transfer otherwise than by simple indorsement. That was not a transfer or assignment of said agreements: *Husband v. Epling*, 81 Ill. 172, 25 Am. Rep. 273. There is a marked difference between assignability and negotiability. That Minna Allmendinger might have assigned said note-contracts does not change the matter. The fact is, she did not do so. A mere indorsement does not operate to transfer or assign a non-negotiable instrument. The title to such an instrument thus indorsed does not pass by mere delivery. Said note-contracts do not come within that class of contracts which, although not negotiable at common law, are made so by the statute of this state.

"The same contingent and uncertain events mentioned in the note-contracts, upon the happening of which, and in which case only, the money should become payable, are recited in the trust deed given to secure the payment of any money that might become due upon said note-contracts and delivered to the appellant therewith. The condition precedent to the contingent liability to pay any money upon said note-contracts is the performance on the part of said Allmendinger of the provisions of the contract mentioned in said note-contracts. That contract is not set out in the bill of complaint filed by appellant, neither is a copy thereof attached to said bill. For aught that here appears, that contract was canceled by the parties thereto.

"No recovery can ever be had upon said note-contracts without averring and proving that the piling and filling referred to had been completed 'according to the requirements' of the agreement therein mentioned. But that agreement is not before us. It is a part of the note-contracts as effectually as though written therein. The note-contracts form but a part of the written agreement between the parties. In *Stacey v. Randall*, 17 Ill. 467, it is said that 'where two instruments are executed as part of the same transaction and agreement, whether at the same or different times, they will be taken and construed ⁴¹¹ together.' In *Gardt v. Brown*, 113 Ill. 475, 55 Am. Rep. 434, the late Mr. Justice Walker, speaking for the court, says: 'No rule of interpretation is more familiar than when two instruments are executed as the evidence of one transaction they shall be read and construed as one instrument.' And in *Wilson v. Roots*, 119 Ill. 379, 10 N. E. 204, the court says:

'The rule is familiar, and of frequent application in cases before this court, that where different instruments are executed as the evidence of one transaction or agreement they are to be read and construed as constituting but a single instrument.' That is the rule of construction very generally, if not universally, adopted by courts of justice.

"It does not appear that said piling and filling contract was ever assigned to appellant or that it ever had any interest therein. As before stated, it does not appear that that contract was ever completed or is now in existence, or that performance thereof can be enforced. If not, then no recovery can be had upon said note-contracts. It devolves upon the appellant to show affirmatively and as a part of the requisites necessary to the maintenance of its bill that it has some interest in the subject matter of this litigation, and has legal and equitable rights which it may in this proceeding protect and enforce. It has not done so, and the court below did not err in dismissing the bill of complaint for want of equity.

"As the appellant does not by its amended bill state a case that shows a right of recovery, it is not in a position to invoke the rule of subrogation presented by counsel. It is therefore quite unnecessary to discuss that rule or cases in which it may be applied.

"The decree of the circuit court dismissing the said amended bill for want of equity is affirmed."

We concur in the foregoing views, and in the conclusion reached. Accordingly, the judgment of the appellate court is affirmed.

NEGOTIABLE INSTRUMENTS ARE SUCH as run to order or bearer, payable in money, for a certain, definite sum, on demand, at sight, or in a certain time, or upon the happening of an event that must occur, and payable absolutely, and not upon a contingency: *Hatch v. First Nat. Bank*, 94 Me. 348, 80 Am. St. Rep. 401, 47 Atl. 908. The test of negotiability of a note is, that it must be an undertaking to pay a certain sum at all events, at some time which must certainly come: *Worden v. Dodge*, 4 Denio, 159, 47 Am. Dec. 247. A note payable to a person when he becomes twenty-one years old is not negotiable. The contingency upon which such note is made payable may never happen: *Kelley v. Hemmingway*, 13 Ill. 604, 56 Am. Dec. 474.

NELSON v. LEITER.

[190 Ill. 414, 60 N. E. 851.]

FRAUDULENT CONVEYANCES—WHAT ARE.—A conveyance may be fraudulent as against creditors, either when it is entered into with actual fraudulent intent, or when, from the nature of the transaction, the conveyance must be held fraudulent as a conclusive presumption of law, without regard to the intent or motives of the debtor.

FRAUDULENT CONVEYANCES WHICH WILL NOT SUPPORT AN ATTACHMENT.—A statute authorizing a writ of attachment to issue, where the debtor has, within two years prior to the filing of the affidavit required, fraudulently conveyed or assigned his assets in hindrance of creditors, applies only when the conveyance was with actual fraudulent intent to hinder and delay creditors, and not when the conveyance was fraudulent in law, regardless of the intent of the debtor.

FRAUDULENT CONVEYANCES—FRAUD QUESTION OF FACT.—Whether a prior conveyance of property was made with actual intent to hinder and delay creditors is a question of fact.

FRAUDULENT CONVEYANCES—RIGHT TO PREFER CREDITOR.—A debtor, in failing circumstances, may pay or secure one creditor to the exclusion of the others, provided the payment is made or security given with intent in good faith to discharge or secure the preferred claim. The fact that the debtor knows that the effect of the transaction, to the extent of such preference, is to hinder and delay other creditors is immaterial.

FRAUDULENT CONVEYANCES—PREFERENCES.—An act relating to corporations, providing that their liability for money loaned shall not exceed one-tenth of the amount of capital stock actually paid in, is for the protection of depositors and stockholders. The fact that the amount of a preference in favor of a corporation made by a failing debtor exceeds such one-tenth of paid-up capital does not render the indebtedness nor any part of it uncollectible as against other creditors of such debtor.

Bentley & Burling, F. P. Blair, and M. Nelson, Jr., for the appellant.

W. W. Gurley, for the appellee.

416 **BOGGS, J.** The appellant company sued out of the superior court of Cook county a writ of attachment against the appellee, but on a hearing before a jury of the issue made under a plea traversing the grounds relied upon to authorize the issuance of the writ the appellant company was defeated. Upon appeal to the appellate court for the first district the judgment of the superior court was affirmed. This is a further appeal to this court.

The affidavit which the appellant company filed to entitle it to the writ of attachment, as ground for the issuing of

the writ, stated that said appellee "has, within two years last past, fraudulently conveyed or assigned his property so as to hinder and delay his creditors." A conveyance of property may be deemed fraudulent as against creditors upon two distinct grounds: 1. Where the conveyance is entered into with the fraudulent intent to hinder and delay creditors: 2. Where, from the terms of the agreement for the conveyance or the nature of the transaction, the conveyance is declared fraudulent as a conclusive presumption of law, without regard to the real motives or purposes of the debtor. In the first class of cases the fraudulent intent is always a question of fact to be established by extrinsic proof. In the latter the conveyance is denounced as fraudulent as a legal inference, though the parties may not have been moved by ⁴¹⁷ any real design to hinder, delay, or defraud the creditor. This is substantially the language of this court in *Lawson v. Funk*, 108 Ill. 502.

The provision of the attachment act here in question authorizes the issuance of a writ of attachment against a debtor who has been guilty, within two years prior to the filing of the affidavit, of having conveyed his property with the actual fraudulent intent and design of hindering and delaying his creditors. It is not sufficient that he has transferred his property under such conditions or circumstances as that, under the rules of law, the conveyance is deemed conclusively fraudulent as an inference of law, though made without any evil intent. To authorize the seizure of his property by attachment in advance of an adjudication that he is indebted to the plaintiff in the attachment suit, it is necessary it should be proven that within two years prior to the filing of the affidavit he had been guilty of conveying his property with the actual intent and purpose to fraudulently hinder or delay his creditors in the collection of demands against him. If a debtor has intentionally committed such a wrong against his creditors the law authorizes the seizure of his property by writ of attachment in advance of the rendition of a judgment against him, for the reason it is considered his conduct justifies the apprehension that he will repeat his fraudulent practices to defeat the efforts of his creditors to enforce payment of his debts if allowed to retain control and possession of his property until the claim of the creditors can be judicially investigated, reduced to judgment, and an execution procured wherewith to levy on his property. That the debtor has done or omitted some act, however innocent or inadvertent, from which an inference

of fraud, in legal effect, arises, does not justify such apprehension nor authorize the creditor to invoke the process of attachment. To justify the issuance of an attachment writ on the ground alleged in the affidavit in the case at ⁴¹⁸ bar it must appear that within the period of two years the debtor has purposely and designedly disposed of his property with the fraudulent intent to hinder and delay creditors from seizing it in order to secure payment of judgments or claims against him: *Weare Commission Co. v. Druley*, 156 Ill. 25, 41 N. E. 48; *Wadsworth v. Laurie*, 164 Ill. 42, 45 N. E. 435.

Whether the appellant company should have prevailed on the issue under the plea traversing the grounds of attachment was a question of fact, as to which we are concluded by the action of the trial and appellate courts, unless error intervened in the ruling of the court during the trial relative to some question of law.

Without conceding the contention of the appellant company that the record presents for our decision the question whether, as matter of law, the evidence presented any defense on the issue in attachment, we may remark that the investigation of the testimony, which we were called upon to make in order to determine as to the correctness of various rulings of the court otherwise brought in review, has demonstrated that it cannot be declared, as matter of law, that the appellee was in fact guilty of actual fraud, as alleged in the affidavit. That was a question of fact, and under the testimony was properly submitted to the jury.

We cannot consider the contention of the appellant company that in stating the reasons which impelled the trial court to withdraw from the jury a letter which had previously been admitted in evidence over the objection of the appellant company, and in the remarks of the court in overruling the motion of the appellant to direct a verdict in its favor, the court expressed an opinion as to the weight and value of the evidence, and thereby prejudiced the cause of the appellant in the minds of the jury, for the reason no objection was preferred at the time to the action of the court so now complained of, no exception preserved thereto, and no attempt was afterward made to obviate the effect of such remarks (if they ⁴¹⁹ were improper) by an instruction to the jury or in any other manner. An objection of this character cannot be first mooted in a court of review: *Hall v. First Nat. Bank*, 133 Ill. 234, 24 N. E. 546.

A brief reference to the facts is required in order to dispose of objections preferred by the appellant company to the rulings of the court in modifying and refusing instructions asked by the appellant company and in giving the instructions asked by the appellee.

For some time prior to the month of June, 1898, the appellee, Joseph Leiter, had been purchasing enormous quantities of wheat in the markets of Chicago and other cities, and contracting for other large quantities to be delivered in the future, on the boards of trade in Chicago and other cities, with the view of holding the grain, or contracts therefor, in expectation of profiting by an increase in the price of the commodity. On or about the twelfth day of June, 1898, it became evident the adventure would not result in a profit, but that great losses must inevitably follow. Money in large sums, entirely beyond the power of the appellee to supply within himself, was demanded as margins to protect his contracts for the purchase of the wheat for future delivery. His father, L. Z. Leiter, had already supplied him with large amounts of money, which he had invested in the enterprise, and his father had also become liable as his indorser and guarantor in still larger amounts. On said twelfth day of June said L. Z. Leiter consulted with Mr. John P. Wilson, a member of the bar of the city of Chicago, as to the advisability of advancing still further amounts for the purpose of protecting the contracts of his son, the appellee, but nothing was said or done at that time with reference to the transfer of the property of the appellee. On the morning of the 13th of June, 1898, the appellee was advised by his representatives on the board of trade in the city of Chicago that the price of wheat had again declined in that market, and that his contracts for purchases ⁴²⁰ of the grain would be closed unless protected by further advances of money. The father of appellee then positively declined to again assist him, and it was manifest a disastrous financial loss could not be averted. Soon after, and during the forenoon of the same day, the appellee and his father, L. Z. Leiter, went to the office of the said John P. Wilson for the purpose of consulting with him as to the best course to be pursued for the protection of the property interests involved in the impending crash. As the result in part of the consultation, the appellee executed and delivered to said John P. Wilson a quitclaim deed conveying to Wilson two certain pieces of business property in the city of Chicago. Each of the properties so

conveyed was subject to mortgages to secure large indebtedness of the appellee, his equity in both being of the aggregate value of about two hundred thousand dollars. The consideration was expressed in the deed to be one dollar and other valuable consideration, but the real consideration was the agreement of said Wilson to receive the title as trustee, to secure an indebtedness which the appellee advised Mr. Wilson existed against him in favor of the Illinois Trust and Savings Bank. The father of appellee was obligated to the bank on such liabilities, or a part thereof, as guarantor or indorser for the son. Mr. Wilson at once prepared a declaration of trust and delivered it to the bank, together with a copy of the deed from the appellee on which the trust was founded.

The contention of the appellant company is, the conveyance to Mr. Wilson was entered into by the appellee with the actual intent to thereby hinder and delay his other creditors. Counsel for appellant do not seem to question the doctrine, well established in this court, that a creditor, though in failing circumstances, may, if he acts in good faith, lawfully prefer one of his creditors, and pay, or secure the payment of, the indebtedness to such favored creditor, though such preference may hinder and delay, or even defeat, other creditors in the collection ⁴²¹ of claims and demands due to them. But counsel, as we understand their contention, insist that the evidence in the case at bar disclosed that it was not the sole purpose and intent of the appellee, in the execution of the deed to Mr. Wilson, to secure the indebtedness to the said trust and savings bank or to thus protect his father as indorser or guarantor for such indebtedness, but that it appeared from the proof, as a matter of fact, the appellee was moved and controlled in the transfer of the property to Mr. Wilson by the intent and purpose to place the property beyond the reach of other of his creditors whom he believed would seize the same by writs of attachment or other process against him in order to collect their claims, and that the conveyance was in fact, in part at least, with the intent to hinder and delay creditors.

Counsel for appellant insist that it appeared, without dispute or conflict in the testimony, that one purpose which moved the appellee to execute the conveyance was the intent to hinder and delay the creditors in the collection of their demands against him, and that the law, upon such undisputed state of case, would declare the conveyance constituted actual fraud, and that it was therefore error in the court to instruct the jury, as

was done in instructions Nos. 1 and 2, given for the appellee, to the effect that they should find for the appellee if they believed, from the evidence, the appellant company had failed to prove that the appellee made the conveyance with the purpose and intent of hindering and delaying his creditors; and upon the same contention appellant company urges it was error to refuse instruction No. 4 asked in its behalf. Instruction No. 4 was as follows:

"It is not necessary, to entitle the plaintiff to recover on the attachment issue, that the defendant should have had no other motive than to hinder or delay a creditor. If he had such motive, even though he also intended to secure the payment of an alleged debt due from him to ⁴²² the Illinois Trust and Savings Bank, your verdict should still be for the plaintiff."

A debtor in failing circumstances, not seeking the benefit of the general assignment act, may decide to prefer and pay one creditor to the exclusion of all others, or may, by mortgage or deed of trust, or in other legal manner, secure the payment of his indebtedness to one creditor, though he thereby hinders and delays his other unpreferred creditors in the collection of their claims, provided the payment is made or security given with the intent, in good faith, to discharge or secure the preferred claim: *Waddams v. Humphrey*, 22 Ill. 661; *Funk v. Staats*, 24 Ill. 633; *Morris v. Tillson*, 81 Ill. 607; *Welsch v. Werschem*, 92 Ill. 115; *Wood v. Clark*, 121 Ill. 359, 12 N. E. 271; *Hulse v. Mershon*, 125 Ill. 52, 17 N. E. 50. A debtor who is indebted to a number of creditors, when he exercises the right to prefer one of his creditors and to secure the payment of his indebtedness to such creditor by a mortgage or deed to a trustee creating a prior lien on his real estate, must, of course, not only be conscious that his act of preference will hinder and delay—possibly defeat—the collection of other demands against him, but if he intends his mortgage or trust deed shall be effective, his purpose being to subordinate the claims of the other creditors to that of the creditor he desires to prefer, it may always be said his intention is to hinder and delay all the unpreferred creditors. The test to be applied is whether the debtor, in exercising the privilege of making the preference, acts in good faith, with the intent to pay, or secure the payment of, a just indebtedness against him, and he cannot be deprived of the right on the ground he knows or intends that the preference given to one creditor, to the extent such preference shall be available and effective, will operate to hinder and

delay other creditors. There was, therefore, no error in granting the instructions asked by the appellee or in refusing said instruction No. 4 asked by the appellant company.

⁴²³ It was not error to refuse to give instruction No. 1 asked by the appellant. It was largely argumentative, directed action by the jury on a partial statement, only, of the facts proper to be considered before taking such action, and was also subject to the objection that it might be inferred from the language employed that it was not sufficient to relieve the transaction in question from the taint of fraud that the conveyance was executed in good faith, to secure a bona fide indebtedness.

We do not assent to the view urged by the appellant company, that as it appeared the indebtedness of the appellee to the Illinois Trust and Savings Bank exceeded in amount one tenth of the capital of the bank actually paid in, under the operation of the provisions of section 10 of an act concerning corporations, etc., approved June 16, 1887 (Starr and Curtis' Annotated Statutes 1896, c. 16a, par. 13), such indebtedness or such excess thereof became "void and uncollectible." Section 10 is as follows: "The total liabilities to any association, of any person, or of any company or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of capital of such association actually paid in. But the discount of bills of exchange drawn in good faith, against actually existing values, and the discount of commercial or business paper actually owned by the person negotiating the same, shall not be considered as money borrowed."

The legislative intent in the enactment of this statute was to prescribe the duties of those officials who stood charged with the management and control of the funds of banks, and who were authorized to pass on applications of persons desiring to borrow from the funds of the bank. The mandate of the statute is, such officials shall not permit any one person, firm, or company to borrow from the funds of the bank, either in one loan or in the aggregate of different loans, a sum exceeding one-tenth ⁴²⁴ part of the amount of the paid-up capital of the bank. The purpose of the enactment is to protect the interests of depositors and stockholders. There is no express declaration in the section that loans in excess of the statutory limitation shall not be collectible, and to so construe the sec-

tion would be to defeat the very purpose which prompted the adoption of the section. The provisions of the twenty-ninth section of the national banking act (U. S. Rev. Stats. 1878, p. 1005) are in no substantial respect dissimilar from those of the section of our statute here under consideration. The supreme court of the United States had occasion, in *Gold Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640, to construe the section of the national banking act referred to, and said: "A defendant sued by a national bank for moneys it loaned him cannot set up as a bar that they exceeded in amount one tenth part of its capital stock actually paid in": 16 Am. & Eng. Ency. of Law, 1st ed., 166.

The judgment of the appellate court is affirmed.

A FRAUDULENT INTENT IN MAKING A CONVEYANCE is ordinarily a question of fact: *Robinson v. McKenna*, 21 R. I. 117, 79 Am. St. Rep. 793, 42 Atl. 510; *Adams v. Dempsey*, 22 Wash. 284, 79 Am. St. Rep. 933, 60 Pac. 649.

CONVEYANCE—FRAUD IN FACT AND IN LAW.—If the legal effect of a conveyance is to work a fraud on the rights of creditors, it will be deemed fraudulent as an inference of law, without regard to the motives that prompted it: *Kingman v. Mowry*, 182 Ill. 256, 74 Am. St. Rep. 169, 55 N. E. 330. There is no difference in principle between fraud in law and fraud in fact in the law of fraudulent conveyances. The result in either case is the same: *Robinson v. McKenna*, 21 R. I. 117, 79 Am. St. Rep. 793, 42 Atl. 510.

FRAUDULENT CONVEYANCE—PREFERENCES.—It is no objection to the validity of a conveyance by a debtor to his creditor that it operates to hinder and delay other creditors, and is made with intent on the part of the debtor that it shall so operate, provided the creditor receives it with the honest purpose of securing his debt: See the monographic note to *State v. Mason*, 34 Am. St. Rep. 396, 397. The motive of the creditor preferred and not of the debtor determines the fraudulent character of such a conveyance: *Snayberger v. Fahl*, 195 Pa. St. 336, 78 Am. St. Rep. 818, 45 Atl. 1065.

ATTACHMENT.—REALTY FRAUDULENTLY CONVEYED by a debtor is subject to attachment: *Bank of Colfax v. Richardson*, 34 Or. 518, 75 Am. St. Rep. 664, 54 Pac. 359.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
INDIANA.

SHIRK v. NEIBLE.

[156 Ind. 66, 59 N. E. 281.]

NEGOTIABLE INSTRUMENTS—NO CONSIDERATION—ANSWER OF—WHEN INSUFFICIENT.—In an action by indorsees on a negotiable note, where the defense of fraud, among others, is set up, an answer of "no consideration," without alleging that the plaintiffs had notice of the invalidity of the note, is insufficient.

APPEAL—REVERSAL—OVERRULING OF DEMURRER.—If a demurrer to a bad paragraph of an answer is overruled, the cause will be reversed unless the record clearly shows that the ruling was harmless.

ATTORNEY AND CLIENT—CONTRACT BETWEEN, FOR FEE—WHEN PRESUMED FRAUDULENT.—If a person charged with murder employs an attorney when he is put in jail, and requests him to fix his fee, which he refuses to do until further investigation, and the attorney, after a preliminary examination and but a few days before the convening of the grand jury, upon the insistence of his client and during the existence of the confidential relation, fixes his fee at a large amount, upon the basis of work that may have to be done, and demands a note and mortgage therefor, the law presumes the transaction to be fraudulent and the fee excessive.

NEGOTIABLE INSTRUMENTS—DEFENSE OF FRAUD—BONA FIDE HOLDER—BURDEN OF PROOF.—If the holder of paper, negotiable by the law merchant, and to which the maker has exhibited a valid defense for fraud, relies upon the fact that he is a bona fide holder thereof, for value, the burden is upon him to aver and prove that he obtained such paper before maturity without notice of the defenses of the maker, and that he paid a valuable consideration therefor.

TRIAL—SILENCE OF SPECIAL FINDING.—If a special finding is silent upon a point, it is equivalent to a finding upon that point against the party having the burden of proving it.

NEGOTIABLE INSTRUMENTS—PURCHASER—PROTECTION OF.—A purchaser of a negotiable instrument is not entitled

to protection as a bona fide purchaser in good faith without notice, if he had such credible information, or was placed in such a situation as would have put a reasonable man upon inquiry, and which, if made, would have disclosed the defenses thereto.

NEGOTIABLE INSTRUMENTS—NOTICE SUFFICIENT TO PUT PURCHASER UPON INQUIRY.—If one who purchased a note of three thousand dollars, secured by a mortgage, knew that the maker and his two sons had been arrested several months previously on a charge of murder; that they had been examined before a committing magistrate; that the father had been discharged and his two sons bound over to await the action of the grand jury; that the note and mortgage were executed while the sons were in jail; and that the payee of the note was a firm of attorneys who represented the parties at such preliminary examination, these facts, considered in connection with the failure of the grand jury to indict the boys, and their discharge, facts occurring in the same town, were sufficient notice of the consideration of the note to have put the purchaser upon inquiry.

NEGOTIABLE INSTRUMENTS—NOTICE OF CONSIDERATION—FINDING.—When an indorsee brings an action on a negotiable note and the maker pleads a want of consideration, a finding that the plaintiff had no "actual" knowledge of the consideration for which the note was given is not equivalent to a finding that the plaintiff had "no" notice of the consideration and defenses.

NEGOTIABLE INSTRUMENTS—PLEA OF NO CONSIDERATION FAILS, WHEN—FRAUD—FAILURE OF CONSIDERATION.—In an action on a negotiable instrument, an answer of no consideration fails if it is shown that there was any consideration whatever for the note, but an answer of fraud, or failure of consideration, travels upon an entirely different theory.

TRIAL—OMISSION OF FACTS FROM SPECIAL FINDING—REMEDY.—If facts proved are omitted from a special finding, a venire de novo cannot be successfully claimed. The remedy is by motion for a new trial.

A. W. Reynolds, L. D. Boyd, and M. A. Ryan, for the appellants.

M. Winfield and J. L. Sinkes, for the appellees.

⁶⁷ HADLEY, J. Foreclosure by appellants as indorsees against the maker of a promissory note governed by the law merchant. Answer in three paragraphs: 1. A general denial; 2. No consideration; and 3. Fraud and failure of consideration, which went to the entire complaint except as ⁶⁸ to the right of plaintiffs to recover and foreclose as to one hundred dollars. A demurrer to each the second and third paragraphs of answer was overruled. Reply that appellants bought the note before maturity for value, and without notice of the fraud.

Under repeated decisions of this court the second paragraph of answer is insufficient for failure to allege appellant's notice of the infirmity of the note: *Coffing v. Hardy*, 86 Ind. 369; *First Nat. Bank v. Ruhl*, 122 Ind. 279, 23 N. E. 766;

Galvin v. Meridian Nat. Bank, 129 Ind. 439, 441, 28 N. E. 847; Shirk v. Mitchell, 137 Ind. 185, 194, 36 N. E. 850; Potter v. Sheets, 5 Ind. App. 506, 32 N. E. 811. For this error the cause must be reversed unless it shall clearly appear from the record that the judgment rests upon some other paragraph of answer, and the ruling harmless to appellants: Evansville etc. Ry. Co. v. Maddux, 134 Ind. 571, 578, 33 N. E. 345, 34 N. E. 511; Miller v. Rapp, 135 Ind. 614, 34 N. E. 981, 35 N. E. 693; Tewksbury v. Howard, 138 Ind. 103, 37 N. E. 355; Ewbank's Manual, sec. 257.

The facts constituting the fraud are set forth with much particularity in the third paragraph of answer. The facts in the case as affirmed by the court's special finding are as follows: November 6, 1896, a firm of learned and skilled attorneys at law resided at Delphi, where for many years they had practiced their profession as partners. At said date Louisa Nipple was shot to death in the cornfield of appellee Daniel W. Neible, at dusk, while engaged in unlawfully taking corn. November 9, 1896, Neible and his two sons, aged thirteen and sixteen, respectively, were arrested upon a warrant issued by a magistrate charging them with the murder of Mrs. Nipple, and placed in jail to await an examination. The homicide caused great excitement in the community, and there were many circumstances indicating the guilt of the boys. At the time, Daniel W. Neible was a well-to-do farmer residing on his farm with a wife and four children, two boys and two girls, and neither he nor either of his boys had ever before been charged with crime. Neible was unfamiliar with proceedings in court and with ⁶⁰ the value of the services of attorneys, and he and his wife were greatly alarmed and excited over the conditions surrounding them and their sons; on the night they were placed in jail Neible employed said attorneys to defend him and his boys. Neible, at the time of the employment, requested said attorneys to inform him what their charges would be for the service, and they informed him that it was impossible to determine at that time what services they would be called upon to render, but that their charges would be reasonable. The attorneys at once entered upon an investigation of the facts and circumstances attending the death of Mrs. Nipple, and diligently prosecuted such investigation up to the time of the convening of the grand jury, and were in daily communication with Neible and other members of the family regarding the case;

said attorneys also appeared at the preliminary hearing before the magistrate and examined the witnesses and otherwise conducted said examination on behalf of Neible and his sons, and upon said preliminary hearing Neible was discharged from custody for want of criminating evidence against him, but his two sons were held without bail to await the action of the grand jury. On December 17, 1896, after the preliminary hearing and a few days before the meeting of the grand jury, Neible and his wife called at the office of their attorneys for the purpose of conferring with them respecting the defense of their sons then confined in jail, and without any previous thought of executing to their attorneys a note and mortgage for their fee; during this conference Neible again requested said attorneys to state what their fee would be, and, upon Neible's insistence, said attorneys stated they would, if required to fix their fee at that time, consider all the work that might have to be done in the case, and would fix it at three thousand dollars, which amount Neible then agreed to pay, whereupon the attorneys then demanded that Neible and wife execute to them the note and mortgage sued on, which they did on said December 17, 1896; the grand jury met on the following first Monday⁷⁰ in January, and, having considered the evidence, refused to indict either of the Neibles, and the sons were also thereupon discharged from custody; the services of said attorneys in and about the defense of the Neibles were worth five hundred dollars, and no more; if all of the Neibles had been indicted for murder and tried separately therefor the services of their attorneys would have been worth three thousand dollars; May 5, 1897, said attorneys, for a valuable consideration, and in the usual course of business, assigned, before maturity, by indorsement, the note and mortgage to the appellants; that at the time the appellants took said note and mortgage the cashier of appellants' bank, who transacted the business, knew that prior to its execution the maker, Daniel W. Neible, and his two sons had been arrested on the charge of murdering Mrs. Nipple; that they had been examined before a magistrate, and that said attorneys had appeared at said examination as their counsel; and that the two sons had been bound over to await the action of the grand jury on said charge and that they were in jail at the time the note and mortgage were executed; but said cashier nor any officer of appellants' bank had actual knowledge of the consideration for which the note was given.

It is shown by the third paragraph of answer and by the special finding that on the night Neible and his sons were thrown into jail the father employed said attorneys for their defense. At the first meeting, and before the employment and while the parties stood at arm's length and upon an equal footing, Neible was capacitated to make a contract with respect to fees that the law would require him to keep. Then there was no special confidence between them, no *vis major*, to give one advantage over the other in making a bargain. At that time, if an agreement could not have been made to his liking, Neible could have turned to other lawyers, without injury, or impairment of his defense. But at this first meeting, and before their employment, Neible requested said attorneys to state the total amount of their fee for the defense, and which they refused to do, assigning for ⁷¹ the refusal the same reasons that subsequently yielded to their effort to do so. The employment made was a general employment under which the attorneys were entitled to a reasonable compensation for the services rendered, and having accepted such employment and established a relation of confidence that gave them vantage ground, the law thereby stripped them of all power during the continuance of the relation to contract with their client for a fee in excess of fair compensation. Therefore, these attorneys, having agreed with their client during the progress of the confidential relation as to the amount of their fee, and demanded and taken a negotiable note and mortgage therefor, the law presumes the transaction to be fraudulent, and the fee excessive, and the burden is laid upon the attorneys to show by clear proof that it was fair, and the amount agreed upon but a reasonable compensation for the services which they had performed or would be called upon to perform under their employment: *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797, and authorities cited. See, also, *McCormick v. Malin*, 5 Blackf. 510, 523; *Rochester v. Levering*, 104 Ind. 562, 568, 4 N. E. 203; *Ross v. Payson*, 160 Ill. 349, 43 N. E. 399; *Gray v. Emmons*, 7 Mich. 533; *Brown v. Bulkley*, 14 N. J. Eq. 451; *Howell v. Ransom*, 11 Paige, 538; *Merryman v. Euler*, 59 Md. 588, 43 Am. Rep. 564.

The record shows that the note and mortgage were executed after the preliminary examination before the magistrate had been held, and but a few days before the convening of the grand jury. The boys had been denied bail and remanded to jail to await the action of the grand jury. The com-

munity was in a state of excitement, and there were many known circumstances indicating the boys' guilt. Neible and his wife were greatly alarmed and excited over the conditions affecting their sons. They were unfamiliar with legal proceedings and the value of attorneys' services, and had not considered the subject of giving a note and mortgage on the farm. They had gone to their attorneys' office for ⁷² counsel upon the momentous subject, burdened with that parental fear and anxiety naturally invoked by the gravity of the situation and the early submission of the facts to the stern judgment of the grand jury. They had gone to those learned in the law, and who had heard and tested the witnesses upon the preliminary hearing, and had inquired into the facts, and weighed the chances for a successful defense, and as against the advice and will of those in such superior position, in all matters pertaining to the defense, it is impossible that there could be in those in such stress an adequate power of assertion against unjust exaction. The law humanely takes cognizance of such situations, and as said in *McLean v. Equitable Life etc. Soc.*, 100 Ind. 134, 50 Am. Rep. 779: "The law is strong, and protects the weak and helpless against such machinations, and, being just, defeats their consummation." It is clear that appellee as maker had a partial defense against the payees of the note.

The law is well settled in this state that if the holder of paper negotiable by the law merchant, and to which the maker has exhibited a valid defense for fraud, relies upon the fact that he is a bona fide holder thereof, for value, the burden is upon him to aver and prove that he obtained such paper before maturity without notice of the defenses of the maker, and that he paid a valuable consideration therefor: *Baldwin v. Fagan*, 83 Ind. 447; *Mitchell v. Tomlinson*, 91 Ind. 167; *Eichelberger v. Old Nat. Bank*, 103 Ind. 401, 3 N. E. 127; *Giberson v. Jolley*, 120 Ind. 301, 22 N. E. 306; *First Nat. Bank v. Ruhl*, 122 Ind. 279, 23 N. E. 766. Under this rule, appellants have the burden of proving their reply that they bought the note without notice of the defenses, and if the want of notice is an ultimate fact, to be stated in terms, material to the support of the complaint, its absence from the special finding will bring the question within the operation of the familiar rule that where a special finding is silent upon a point, it is equivalent to a finding upon that point against the party having the burden of proving it. We cannot accept the

contention that "no ⁷³ actual knowledge of the consideration for which said note was given" is equivalent to a finding that appellants had no notice of the consideration and defenses. The purchaser of commercial paper is not entitled to protection, if it is shown that he had actual knowledge of the vice of the paper; neither is he entitled to protection if it is shown that he had such credible information as would put a reasonable person upon inquiry. In all cases he is required to act in good faith, and as said in *Citizens' Bank v. Leonhart*, 126 Ind. 206, 25 N. E. 1099, "use reasonable diligence when such paper is offered for sale, under circumstances that are calculated to excite the suspicion of a reasonably cautious person." "We fully concede," as said by Mitchell, J., in *Schmueckle v. Waters*, 125 Ind. 265, 269, 25 N. E. 281, "the position that the holder of negotiable paper, who takes it before maturity in the usual course of business, without notice of facts which impeach its validity between antecedent parties, or of such facts as put him upon inquiry, holds it by a good title, free from defenses, and that unless there are circumstances which excite suspicion, the purchaser is not bound to make inquiry at the time of purchase. Where, however, the circumstances show that the purchaser of paper refrained from making inquiry lest he should thereby become acquainted with the transaction out of which the note originated, he cannot occupy the attitude of a holder in good faith without notice": See, also, *Tescher v. Merea*, 118 Ind. 586, 21 N. E. 316; *State Nat. Bank v. Bennett*, 8 Ind. App. 679, 684, 36 N. E. 551; *Daniel on Negotiable Instruments*, secs. 769, 799. We must therefore inquire whether at the time the note was presented to appellants they were in a situation which placed them upon inquiry, and if they were, and inquiry would have disclosed the defenses, it must be held, in the absence of a finding upon that point, that they did have notice.

The record shows that said attorneys resided, and had for many years practiced their profession, as partners, in the city of Delphi; that appellants' bank, the court, and jail were situate in the same place; that when the note was ⁷⁴ presented at the bank, the cashier, who discounted it, knew that Neible and his two sons had been incarcerated in the jail, charged with the murder of Mrs. Nipple; that at the preliminary hearing before a magistrate in November, said attorneys, whom he knew to be practicing law as partners, appeared and conducted the defense for the Neibles; that upon the preliminary hearing the elder Neible was dis-

charged from custody and that the two sons were held in jail for the action of the grand jury. He also knew that the note was executed while the boys were in jail awaiting the convening of the grand jury, and that it was executed to the attorneys in their partnership name. Can it be said that these facts were not sufficient to create in the mind of a reasonably cautious person a strong suspicion that the consideration of the note was professional services rendered the Neibles in their recent arrest for murder? These circumstances were so pointed and led so directly to that conclusion that it seems incredible that the cashier did not at the time entertain that opinion. The subject of the arrest and preliminary trial being a matter of public notoriety, and of which the cashier had actual knowledge, the failure of the grand jury to indict and the discharge of the boys from custody, which had occurred in the same town more than three months before, we may reasonably assume was also known to him, and so knowing, or entertaining a strong suspicion of the fact, he was undoubtedly put upon his inquiry to ascertain whether three thousand dollars for professional services in the preliminary hearing, for general counsel, and for all possible preparation for the defense prior to the action of the grand jury, was not an excessive fee, and knowing that the note and mortgage were executed several weeks after the beginning of the service, and during the continuance of the relation of attorney and client, he was also bound to know that the courts would not enforce them beyond the point of reasonableness.

The first conclusion of law is "that as between the payees ⁷⁵ in the note and mortgage and the defendants the same are invalid, except as to five hundred dollars, the value of the services actually rendered by the payees of the note to the defendant, as found in the special finding." This is in harmony with the doctrine laid down in *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797, to the effect that in such cases there may be a recovery upon the contract for the reasonable value of services rendered. The second conclusion of law is "that the plaintiffs took the note and mortgage sued on subject to the defendant's defenses." And we so adjudge.

It remains to be determined whether it clearly appears from the record that the judgment rests upon the third paragraph of answer. Courts will not enforce a contract between the parties thereto that is not supported by a good or

valuable consideration, that is, by something of value, or esteemed in law as of value, moving between the parties, which they have mutually agreed to exchange. This upon the principle that the law will not assist one who has not been damaged. Adequacy of consideration is not required. The law is satisfied if the parties freely agree to it. An answer of no consideration, therefore, advises the court that the contract sued on is not enforceable because it has no foundation to rest upon, and it has been repeatedly held that, under such a plea, the defense will fail if it is shown there was any consideration whatever for the contract. The amount of it is immaterial: *Kernodle v. Hunt*, 4 Blackf. 57, 59; *Wheelock v. Barney*, 27 Ind. 462; *Crow v. Eichinger*, 34 Ind. 65; *Mooklar v. Lewis*, 40 Ind. 1; *Wilson v. Monticello*, 85 Ind. 10, 17. While, upon the other hand, an answer of fraud, or failure of consideration, travels upon an entirely different theory. An answer of failure of consideration implies that there was a consideration sufficient to support the contract, but that it has subsequently failed in whole or in part without fault of the defendant. In this case the third paragraph of answer, in effect, admits a consideration of one hundred dollars, which is sufficient ⁷⁶ to defeat the defense under the second paragraph of answer, and the court found that there was a valid consideration for the note and mortgage of five hundred dollars, and gave judgment and decree of foreclosure for the same. This clearly shows that the judgment rests upon the third paragraph, and that appellants were not harmed by the overruling of their demurrer to the second paragraph. For reasons appearing in what has been heretofore said we hold that the conclusions of law were correctly stated.

Appellants' motion for a venire de novo was overruled, and they complain that the special finding was defective, among other things, for failure to set forth "the time the note and mortgage became due, rate of interest, where payable, that it is or is not secured by mortgage, or the description of the real estate in said mortgage." The fourth conclusion of law is "that the plaintiffs are entitled to a judgment on the note in suit and a decree foreclosing the mortgage as to that amount or six hundred and seven dollars and fifty cents," and a judgment and decree were rendered accordingly. What difference can it make to appellants whether the matter complained of is in or out of the special finding, since they received all they ask for in their complaint, except as to amount. Un-

less they can show that they were injured in some way by the omission, which they do not attempt, this court cannot entertain their objection: *Harness v. Harness*, 81 Ind. 160. Furthermore, if facts proved by the evidence are omitted from the special finding, a venire de novo cannot be successfully claimed. The remedy is by motion for a new trial: *Elliott's Appellate Procedure*, sec. 759, and cases cited.

The motion for a new trial challenges some of the findings, and some omissions. We have carefully compared the evidence with such findings, and we fail to note any omissions, not in dispute, that can injure appellants, or any finding not sufficiently supported by the evidence. We find no available error. Judgment affirmed.

Contracts Between Attorneys and Clients.*

General Observations.—The relation which exists between attorney and client is one of confidence, and gives the attorney great influence over the actions and interests of the client; and, in view of this confidential relation, transactions between attorney and client are often declared to be voidable which would be deemed to be unobjectionable between other parties: *Elmore v. Johnson*, 143 Ill. 513, 36 Am. St. Rep. 401, 32 N. E. 413. Attorney and client sustain to each other the severe relation of trustee and cestui que trust, and their dealings together are subject to the same intendments and imputations as those which obtain between the trustees and their beneficiaries: *Yonge v. Hooper*, 73 Ala. 119. Before an attorney undertakes the business of a client he may contract with reference to compensation for his services, as no confidential relation there exists and the parties deal with each other at arm's length: *Elmore v. Johnson*, 143 Ill. 513, 36 Am. St. Rep. 401, 32 N. E. 413; *White v. Tolliver*, 110 Ala. 300, 20 South. 97. Any contract then made is as valid and unobjectionable as if made between other persons not occupying fiduciary relations, and who are, in all respects, competent to contract with each other: *Schaffner v. Kober*, 2 Ind. App. 409, 28 N. E. 871; *White v. Tolliver*, 110 Ala. 300, 20 South. 97; and the attorney, as a condition of enforcing it, is not bound to show that it was fair, just, and reasonable, as he would be required to do, as will be shown further on, if the contract were made between attorney and client after that relation had been formed: *Dockery v. McLellan*, 93 Wis. 381, 67 N. W. 733. The same rule applies with regard to dealings between the parties after the relation of attorney and client has been dissolved. After the suit is ended, and the dependence of the client removed, and his perfect

*REFERENCES TO MONOGRAPHIC NOTES.

ChamPERTY and maintenance: 15 Am. Dec. 317-322.

Contracts of attorneys void as against public policy: 13 Am. St. Rep. 297-300.

Lien of attorneys: 51 Am. St. Rep. 251-281.

freedom of action restored, the law will permit the client to make any compensation that he may think proper: *Elmore v. Johnson*, 143 Ill. 513, 36 Am. St. Rep. 401, 32 N. E. 413; *Phillips v. Overton*, 4 Hayw. (Tenn.) 291 *McElrath v. Dupuy*, 2 La. Ann. 521; *Bibb v. Smith*, 1 Dana, 580. When the amount of compensation is not fixed by any contract under which an attorney is employed, he is entitled to recover such reasonable fee under an implied contract as his services are worth, or as has been usually paid to others for similar services: *Elmore v. Johnson*, 143 Ill. 513, 36 Am. St. Rep. 401, 32 N. E. 413; *Planters' Bank v. Hornberger*, 4 Cold. 531; *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797.

But after the fiduciary relation between attorney and client has commenced, an agreement between them respecting the attorney's compensation for services rendered and to be rendered will be jealously scrutinized, and cannot be supported without clear proof on the part of the attorney that the amount stipulated for is a fair, reasonable, and just remuneration for his services: *White v. Tolliver*, 110 Ala. 300, 20 South. 97; *Dickinson v. Bradford*, 59 Ala. 581, 31 Am. Rep. 23; *Planters' Bank v. Hornberger*, 4 Cold. 531; *Rose v. Mynatt*, 7 Yerg. 30; *McMahan v. Smith*, 6 Heisk. 167; *Newman v. Davenport*, 9 Baxt. 538; *Bibb v. Smith*, 1 Dana, 580; *Thomas v. Turner*, 87 Va. 1, 12 S. E. 149, 668. An attorney, after the commencement of the confidential relation, cannot lawfully stipulate for excessive fees, in other words, for more than his services are reasonably worth, or take unreasonable securities from his client: *Phillips v. Overton*, 4 Hayw. (Tenn.) 291; *Rose v. Mynatt*, 7 Yerg. 30; *Newman v. Davenport*, 9 Baxt. 538; *Bolton v. Daily*, 48 Iowa, 348; *Planters' Bank v. Hornberger*, 4 Cold. 531; *Colgan v. Jones*, 44 N. J. Eq. 274, 18 Atl. 55. So an agreement between attorney and client, while the relation continues, whereby the former secures a larger compensation for the same services than was stipulated for when he undertook the business, is ordinarily invalid, and cannot be enforced: *Lecatt v. Sallee*, 3 Port. 115, 29 Am. Dec. 249; *Hughes v. Zeigler*, 69 Ill. 38; *Dyer v. Sutherland*, 75 Ill. 583; *Marshall v. Dossett*, 57 Ark. 93, 20 S. W. 810. A statute which enacts that "any contract made with an attorney for other or higher fees shall be valid, and may be enforced in like manner with other contracts." does not apply to an agreement made after the relation of attorney and client has been established: *Thomas v. Turner*, 87 Va. 1, 12 S. E. 149, 668. An attorney may lawfully charge for extra work, not within the purview of his original contract: *Singer v. Steele*, 125 Ill. 426, 17 N. E. 751; and where an attorney and an intestate had made a contract for a fixed fee it was held, in *Goldthwaite v. Whitney*, 50 Fed. 668, that a new contract between the attorney and the representatives of the estate, made after the intestate's death, whereby there was substituted for the fixed fee a contingent fee of ten per cent of the amount recovered, was valid. It cannot be asserted that an attorney, having a contract with a

client in reference to one subject matter, may not make valid contracts with his client in reference to another, and thereby fix his compensation for services to be rendered under the latter, but even in this class of cases it has often been held that such contracts should be closely scrutinized, "because usually great confidence is reposed in the attorney, and he is in an attitude to exert a strong influence over the actions and interests of the client," and that a compensation unreasonably large for the services rendered should not be allowed: *Waterbury v. Laredo*, 68 Tex. 565, 5 S. W. 81. An attorney may contract with his client for a special fee in a special case, where the client is a corporation which the attorney is serving at a salary which may be changed at the option of the corporation, and when the period of the attorney's employment is subject to the same condition: *Bartlett v. Odd Fellows' Sav. Bank*, 79 Cal. 218, 12 Am. St. Rep. 139, 21 Pac. 743; but when he contracts to perform professional services, respecting a particular matter, for a specified amount, he cannot, under such contract, recover for services performed by him for the same client, as to another separate and distinct matter: *Wells v. Haynes*, 101 Ga. 841, 28 S. E. 968.

We are told in some of the cases that all dealings between attorney and client, for the benefit of the former, and including contracts made after the commencement of the relation, for the attorney's compensation, are not only regarded with jealousy and closely scrutinized, but that they are presumptively invalid on the ground of constructive fraud, and that such presumption can be overcome only by the clearest and most satisfactory evidence. This rule is said to be founded in public policy, and to operate independently of any ingredient of actual fraud, or of the age or capacity of the client, being intended as a protection to the client against the strong influence to which the confidential relation naturally gives rise: See the principal case: *Thomas v. Turner*, 87 Va. 1, 12 S. E. 149, 668; *Elmore v. Johnson*, 143 Ill. 513, 36 Am. St. Rep. 401, 32 N. E. 413; *Shropshire v. Ryan*, 111 Iowa, 677, 82 N. W. 1035; *Bibb v. Smith*, 1 Dana, 580. Thus, when a client, during the pendency of his suit, conveys to his attorney part of the property in litigation as payment for his legal services, with full knowledge that the part conveyed is of greater value than such services, the transaction is presumably fraudulent: *Elmore v. Johnson*, 143 Ill. 513, 36 Am. St. Rep. 401, 32 N. E. 413. So, if security is taken by an attorney from his client, after the confidential relation has commenced, to compensate the attorney for his services, the presumption is that the transaction is unfair: *Brown v. Bulkley*, 14 N. J. Eq. 451. The assignment of a mortgage by a client to his attorney is presumptively void: *Merryman v. Euler*, 59 Md. 588, 43 Am. Rep. 564.

When attorney and client, after the commencement of the confidential relation, enter into a contract to compensate the attorney for his services, the burden of proof is upon the attorney to show

the fairness of the transaction, and that the compensation provided for does not exceed a fair and reasonable remuneration for the services which have been rendered or which it is his duty to render: *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797; *Yonge v. Hooper*, 73 Ala. 119; *White v. Tolliver*, 110 Ala. 300, 20 South. 97; *McMahan v. Smith*, 6 Heisk. 167; *Newman v. Davenport*, 9 Baxt. 538; *Brown v. Bulkley*, 14 N. J. Eq. 451. He must show that the contract was free from all fraud, undue influence, and exorbitancy of demand: *McMahan v. Smith*, 6 Heisk. 167; *Planters' Bank v. Hornberger*, 4 Cold. 531. As comprehensively said in *Elmore v. Johnson*, 143 Ill. 513, 36 Am. St. Rep. 401, 32 N. E. 413, the burden is on the attorney to show affirmatively the most perfect good faith, the absence of undue influence, a fair price, knowledge, intention, and freedom of action by the client, and also that he gave him full information and disinterested advice. He must not only show that the contract was perfectly fair, but that it was entered into by the client freely and with a full understanding as to his rights and as to the effect of the instrument: *Thomas v. Turner*, 87 Va. 1, 12 S. E. 149, 668. Thus, a contract made by an attorney with an heir or next of kin, by which he is to receive for his services a large share of his client's interest in an estate, is always regarded with suspicion, and if the attorney seeks to enforce it, the burden is on him to show that the contract was fair and just, and that his client acted understandingly and with full knowledge of all the facts connected with the transaction: *Matter of Cohen*, 84 Hun, 586; 32 N. Y. Supp. 851; and see *Ryan v. Ashton*, 42 Iowa, 365. The rule casting upon an attorney the burden of showing that a contract entered into between him and his client was a fair and reasonable one applies, however, only in the enforcement of such contracts, and not in their interpretation: *Willoughby v. Mackall*, 1 App. Cas., D. C., 411, 415.

It must be observed, in view of what is above said, that contracts between attorney and client, made after the employment of the attorney by the client, and respecting the former's compensation, if invalid, are only presumptively so, which requires the attorney to show their fairness, but they are not void by reason of their having been entered into subsequent to the attorney's employment by the client: *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797. There is no law which prohibits an attorney from contracting with his client respecting the former's fees, and when such contracts are fairly made they are steadily enforced. The law commands that all the transactions of an attorney with his client "shall be anxiously and jealously scrutinized, that the client may be protected from his own overweening confidence, and from the influence or ascendancy which the relation generates," but it does not incapacitate the attorney from contracting with, or from becoming the recipient of the bounty of, the client: *Dickinson v. Bradford*, 59 Ala. 581, 31 Am. Rep. 23; *Fowler v. Callan*, 102 N. Y. 395, 7 N. E. 169;

Dockery v. McLellan, 93 Wis. 381, 67 N. W. 733; and see the subdivision, *infra*, "Gifts to Attorneys."

Hence, a contract between attorney and client, respecting the former's compensation, though made after the confidential relation has been formed, if fair and reasonable, and entered into by the client knowingly and understandingly and for an adequate consideration is valid, and may be enforced where there has been no fraud or undue influence: **Dockery v. McLellan**, 93 Wis. 381, 67 N. W. 733; **Wharton v. Hammond**, 20 Fla. 934.

But there can be no recovery by an attorney upon a contract for fees, made with his client after the confidential relation has commenced, which is suspicious, oppressive, or fraudulent: **Downing v. Major**, 2 Dana, 228; **Judah v. Trustees**, 23 Ind. 273; **Planters' Bank v. Hornberger**, 4 Cold. 531; **Ryan v. Ashton**, 42 Iowa, 365.

On the contrary, such a contract will be set aside by a court of equity, upon the timely application of the client: **Polson v. Young**, 37 Iowa, 196; but the client's right to object to the contract must be exercised within a reasonable time, which is to be determined by the court under all the circumstances of the case: **Elmore v. Johnson**, 143 Ill. 513, 36 Am. St. Rep. 401, 32 N. E. 413. The contract will not be set aside if there has been laches and acquiescence: **Elmore v. Johnson**, 143 Ill. 513, 36 Am. St. Rep. 401, 32 N. E. 413; **Smith v. Thompson**, 7 B. Mon. 305, 310. If the title to property is so involved in litigation that the value of the property depends upon the decision as to such title, a contract between attorney and client, made during the pendency of the litigation to compensate the attorney for his legal services with part of the property involved, is voidable at the election of the client, irrespective of the fairness or unfairness of the contract, provided such election is exercised within a reasonable time: **Elmore v. Johnson**, 143 Ill. 513, 36 Am. St. Rep. 401, 32 N. E. 413. An implied contract, however, between attorney and client, as to the former's compensation, does not deprive him of the right to a reasonable compensation for his services under the rule of the quantum meruit. In other words, he is entitled to a reasonable compensation for his services, though his contract therefor is invalid: **Davis v. Webber**, 66 Ark. 190, 74 Am. St. Rep. 81, 49 S. W. 822; **Thomas v. Turner**, 87 Va. 1, 12 S. E. 149, 668. If an attorney takes security for his compensation from his client, pending the confidential relation, it will not be enforced by a court of equity, in favor of the attorney, for anything beyond what is justly due: **Brown v. Bulkley**, 14 N. J. Eq. 451; **Porter v. Bergen**, 54 N. J. Eq. 405, 34 Atl. 1067; **Mott v. Harrington**, 12 Vt. 199; **Thomas v. Turner**, 87 Va. 1, 12 S. E. 149, 668.

By statute, in some of the states, the measure and mode of compensation of an attorney are left unrestricted to the agreement, express or implied, of the parties: **Whitehead v. Kennedy**, 69 N. Y. 462; **Beals v. Wagener**, 47 Minn. 489, 50 N. W. 535; **Thomas v. Turner**, 87 Va. 1, 12 S. E. 149, 668; **Croco v. Oregon Short Line R. R. Co.**, 18 Utah, 311, 54 Pac. 985. Under such statutes, there

seems to be no reason why attorney and client may not, after the former's services are rendered, agree upon what they are worth, and what the client shall pay for them, as fully as they may agree before they are rendered: *Beals v. Wagener*, 47 Minn. 489, 50 N. W. 535; and under such statutes, it is competent for attorney and client to agree that the attorney's compensation shall be contingent upon success, and payable by percentage or otherwise out of the proceeds of the litigation: *Croco v. Oregon Short Line R. R. Co.*, 18 Utah, 311, 54 Pac. 985. The New Jersey statute regulating fees does not control the charges which attorneys, solicitors, and counsel may make against their clients, nor are such charges otherwise regulated by the statutes of that state: *Strong v. Mundy*, 52 N. J. Eq. 833, 31 Atl. 611; and the statute of Florida, regulating "commissions for collecting," between attorneys and clients, relates only to fees in matters of collection. It does not stand in the way of allowing attorneys a reasonable and fair remuneration for "other" services: *Carter v. Bennett*, 6 Fla. 214, 258.

Construction and Effect of Contracts—Recovery by Attorney.—The contract of an attorney to carry on or defend a suit is an entire contract: *Eliot v. Lawton*, 7 Allen, 274, 83 Am. Dec. 683; *Underwood v. Lewis*, [1894] 2 Q. B. 306; and the period of limitation runs only from the termination of the suit. An attorney, under a general employment, can enforce no claim for services until the final termination of the suit, unless the relation of attorney and client changes before that time, in which case, if the change was for good cause, the attorney would have a right to enforce his claim for past services. If the change was caused by the attorney's justifiable withdrawal, the statute of limitations would commence to run from the time of such withdrawal: *Eliot v. Lawton*, 7 Allen, 274, 83 Am. Dec. 683. But if there is any question as to the agreement and understanding of the parties, the entirety of the contract is a question of fact to be determined upon evidence; and this applies to the question as to whether the employment of an attorney to prosecute a petition for divorce is an entire contract or not: *Dodge v. Janvrin*, 59 N. H. 16.

An express contract as to counsel fees may be established by correspondence: *Cotzhausen v. Central Trust Co.*, 79 Wis. 613, 49 N. W. 158. An attorney's agreement not to charge his employers for any costs, except "officer's fees," on demands uncollected, does not preclude him from charging the whole costs of an execution collected by a levy on land: *Davis v. Downer*, 10 Vt. 529. An agreement to pay one attorney as much as another connected with him in the case is not void for want of mutuality or certainty: *Lungerhausen v. Crittenden*, 103 Mich. 173, 61 N. W. 270. When a client has promised to pay his attorney a reasonable compensation out of the proceeds of the litigation, it does not amount to an equitable assignment of an interest in the subject matter of the litigation: *Gillette v. Murphy*, 7 Okla. 91, 54 Pac. 413; and the attorney, therefore, has no lien thereon for his compensation: *Story*

v. Hull, 143 Ill. 506, 32 N. E. 265. His only remedy for a breach of the promise to pay is an action at law, and the question as to what is a reasonable compensation is purely a question of fact upon which the client has a constitutional right to take the verdict of a jury: *Story v. Hull*, 143 Ill. 506, 32 N. E. 265; epitomized in the note to *Elmore v. Johnson*, 36 Am. St. Rep. 413-415. It is possible for a contract as to the compensation of an attorney to be so merged in, or superseded by, the terms of a second contract that the attorney can recover nothing for services rendered during the litigation. As an illustration of this, see *Brown v. Curtis*, 111 Iowa, 542, 82 N. W. 945.

If a fixed sum has been agreed upon between attorney and client as counsel fees, the attorney may recover it by an action: *Zabriskie v. Woodruff*, 48 N. J. L. 610, 7 Atl. 336. He is entitled to the agreed fee, though at his request the client employed counsel to assist him in the court of appeals, where it was not agreed that the attorney was to follow the case to any court to which it might be carried: *Townsend v. Rhea*, 18 Ky. Law Rep. 901, 38 S. W. 865. The client may, by agreement with his attorney, fix the latter's compensation, and the amount so fixed governs: *Tennant v. Fawcett* (Tex., Oct., 1900), 58 S. W. 824. The contract between attorney and client as made stands: *Schaffner v. Kober*, 2 Ind. App. 409, 28 N. E. 871; *Gorrell v. Payson*, 170 Ill. 213, 48 N. E. 433; and a court of equity cannot interpose to increase the compensation agreed on: *Lewis v. Yale*, 4 Fla. 418. If a contract for services as attorneys has been made in the name of a firm of lawyers, the members of the firm are bound thereby individually after the dissolution of the firm, and cannot charge for subsequent services contrary to its terms, in the absence of clear proof that the contract was superseded by a second one: *Knight v. Whitmore*, 125 Cal. 198, 57 Pac. 891. The fixed sum agreed upon is the maximum limit of the attorney's recovery: *Elliott v. Rubel*, 132 Ill. 9, 23 N. E. 400; but his claim for services must be based on a contract, express or implied: *Ex parte Fort*, 36 S. C. 19, 15 S. E. 332; *Adams v. Stevens*, 26 Wend. 451; and if there is no contract, express or implied, there can be no recovery: *Ex parte Fort*, 36 S. C. 19, 15 S. E. 332; *Evans v. Mohr*, 153 Ill. 561, 39 N. E. 1083. An attorney cannot recover for a breach of contract which was caused by his fault: *Richards v. Washburn*, 28 App. Div. 109, 50 N. Y. Supp. 885, 163 N. Y. 585, 57 N. E. 1123; *Walsh v. Shumway*, 65 Ill. 471; but if the breach was caused by the client, the attorney may recover on a quantum meruit for the reasonable value of his services, or he may sue upon the contract and recover damages for its breach: *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797.

An attorney may recover on a quantum meruit for services performed where there is no express contract: *Wells v. Haynes*, 101 Ga. 841, 28 S. E. 968; or where the complete performance of his services has been rendered impossible, or otherwise prevented by the client: *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797; but

an attorney having a special contract cannot recover on a quantum meruit: *Bull v. St. Johns*, 39 Ga. 78; *Mazureau v. Morgan*, 25 La. Ann. 281. A lawyer is not an insurer of the result in a case in which he is employed, unless he makes a special contract to that effect and for that purpose. When he is employed in a case, there is no implied contract that he will bring to bear learning, skill, or ability beyond the average of his profession; nor can more than ordinary care and diligence be required of him, unless a special contract is made requiring it: *Babbitt v. Bumpus*, 73 Mich. 331, 16 Am. St. Rep. 585, 41 N. W. 417. If there is no ambiguity in the language of a contract between attorney and client, when applied to undisputed facts, it is the province of the court only to interpret it; but when conflicting inferences as to the meaning of the contract may reasonably be drawn from the evidence, it should be left to a jury to say which is the correct inference: *Vilas v. Bundy*, 106 Wis. 168, 81 N. W. 812.

An attorney's contract with his client for a stated compensation for services is binding, though such compensation is inadequate: *McIlvoy v. Russell*, 15 Ky. Law Rep. 740, 24 S. W. 3; *Walsh v. Board of Trustees*, 17 Mont. 413, 43 Pac. 180. After services have been performed by an attorney, he may recover therefor: *Taggart v. Hower* (Pa., March, 1889), 17 Atl. 13; but he cannot, for a certain amount, offer his services, in defending a school board, in the trial of a suit, and, after rendering such services, with the knowledge of the board, withdraw his proposition after the trial is completed, and recover for a larger amount, though such proposition had never been formally accepted by the board: *Walsh v. Board of Trustees*, 17 Mont. 413, 43 Pac. 180. After a contract by an attorney to render services in litigating the title to land, in consideration of a conveyance of a part thereof, as compensation for his services, has been fully performed by the attorney, the contract may be specifically enforced against the client and his vendees with notice, whether the client had title or not; but if the attorney has not fully or substantially performed the contract, and performance has not been waived, the contract cannot be specifically enforced: *King v. Gildersleeve*, 79 Cal. 504, 21 Pac. 961. An attorney discharged without cause while acting under a contract, under which he was to have a specific amount for services which he had agreed to render, may recover the amount to which he would have been entitled had his client allowed him to complete the services which he had commenced to perform. The client, by wrongfully preventing the performance of the acts which entitled the attorney to the special compensation, becomes answerable in damages in such amount, with interest from the time it became due: *Bartlett v. Odd Fellows' Sav. Bank*, 79 Cal. 218, 12 Am. St. Rep. 139, 21 Pac. 743.

When a railway company agrees to pay an attorney reasonable fees "for assisting in trials against the company," he is entitled to pay for necessary services rendered in actions. His right to compensation will not be limited to services rendered in "trials," in the

narrowest technical sense of that term: *Louisville etc. Ry. Co. v. Reynolds*, 118 Ind. 170, 20 N. E. 711. But where a contract between attorney and client covers, in express terms, all the work in all the courts, the attorney is not entitled to further compensation for litigating the matter in the supreme court: *Niagara Fire Ins. Co. v. Hart*, 13 Wash. 651, 43 Pac. 937. The fact that there is a contract between attorney and client as to the performance of certain services does not, however, repel the presumption that the client has promised to pay the attorney for other services rendered at the client's request, though an express promise to pay therefor does not exist: *Isham v. Parker*, 3 Wash. 755, 29 Pac. 835. When an attorney is employed to defend an indicted person, and a note is given for the amount of the fee, which is fixed, a court or jury will not, in an action on the note, inquire into the matter for the purpose of making a contract for the parties. If there has been no fraud, the consideration cannot be attacked on the ground of its inadequacy. The measure of recovery is the amount of the note, and the jury have no right to measure the amount of recovery by the value of the services actually rendered by the attorney: *Schaffner v. Kober*, 2 Ind. App. 409, 28 N. E. 871. If two attorneys have been employed to perform services, the fact that one does more work than the other does not give the former a right to more than his agreed share of compensation: *Bundy v. McLean*, 104 Wis. 263, 80 N. W. 445.

Champerty, Barratry, and Maintenance.—The common-law doctrines of champerty and maintenance have been greatly modified in many states of the American Union, as the state of society which produced them and the evils which they were intended to remedy do not exist here. As said by Kinney, J., in *Wright v. Meek*, 3 G. Greene, 472, 482, these doctrines are wholly unnecessary in this country, and entirely unsuited to the condition of affairs. "To transfer the right of action, or to maintain the suit of another without having any direct or contingent interest in it, will not necessarily produce mischief or oppression in this country. It may, on the other hand, in particular cases, have a tendency to secure rights and promote the ends of justice": *Wright v. Meek*, 3 G. Greene, 472, 484, per Kinney, J. The whole doctrine of champerty and maintenance is said to be "a relic of a state of things long since passed away": *Duke v. Harper*, 2 Mo. App. 1, 10; but it still exists in a more or less qualified form in many of the states: See the monographic note to *Thalhimer v. Brinckerhoff*, 15 Am. Dec. 319, discussing champerty and maintenance. It would not be useful to cite all of the old cases concerning the doctrines of champerty and maintenance as applied to contracts between attorney and client, but our discussion will extend far enough to give a clear view of the general principles which govern the matter.

One cause of the apparent confusion in the cases respecting champerty arises out of the definition of that term. It is sometimes

defined as a bargain for a portion of the recovery, in case of a successful termination of the suit, whereupon the champertor is to carry on the party's suit at his own expense. Other definitions omit the statement that the champertor "is to carry on the party's suit at his own expense." Hence it is that, in some of the cases, a client's agreement with his attorney to give the latter a certain per cent or designated portion of a recovery, in case of success, is held to be champertous and void, or, at least, not enforceable: *Weedon v. Wallace*, Meigs, 286; *Stanton v. Haskin*, 1 McAr. 558, 29 Am. Rep. 612; *Scobey v. Ross*, 13 Ind. 117; *Orr v. Tanner*, 12 R. I. 94; *Rust v. Larue*, 4 Litt. 412, 14 Am. Dec. 172; *Davis v. Sharron*, 15 B. Mon. 64; *Mazureau v. Morgan*, 25 La. Ann. 281; *Berrien v. McLane*, Hoff. Ch. 421; *In re Bleakley*, 5 Paige, 311; *Merritt v. Lambert*, 10 Paige, 352; *Wallis v. Loubat*, 2 Denio, 607; *Ackert v. Barker*, 131 Mass. 436; and see *Martin v. Veeder*, 20 Wis. 486. Such agreements have been deemed to be against public policy: *Jenkins v. Bradford*, 59 Ala. 400; *Pennsylvania Co. v. Lombardo*, 49 Ohio St. 1, 29 N. E. 573. If a client gives his attorney a note for a fixed sum for services to be rendered in a suit, and at the same time agrees to give him half of the recovery, the note and agreement form but one contract, and both are champertous and void: *Dumas v. Smith*, 17 Ala. 305. A champertous agreement between an attorney and client is void: *Duke v. Harper*, 66 Mo. 51, 27 Am. Rep. 314; *Pennsylvania Co. v. Lombardo*, 49 Ohio St. 1, 29 N. E. 573, whether prohibited by statute or not; *Johnson v. Van Wyck*, 4 App. Cas., D. C., 294. It has been held that an agreement by an attorney at law to prosecute a suit in which he had no previous interest, and to receive as compensation a stipulated sum in excess of the value of his services if successful, and nothing if the case was lost, is contrary to public justice and professional duty, and is void for champerty and maintenance, and the contract being illegal, the law does not imply a promise to pay the attorney what his services were worth, and the client may maintain an action against him for all he received, less any costs properly paid by him: *Butler v. Legro*, 62 N. H. 350, 13 Am. St. Rep. 573; that a contract to carry on a land suit for profits of the land, as well as for a part of it, is prohibited: *Redman v. Sanders*, 2 Dana, 68; *Wallis v. Loubat*, 2 Denio, 607; *Merritt v. Lambert*, 10 Paige, 352; that a contract between attorney and client, whereby the former agrees to carry on the suit for one-half of the recovery and the latter agrees not to compromise or settle the claim, is invalid, as any contract between attorney and client, whereby the latter is prevented from settling or discontinuing his suit is void on the ground that it tends to foster and encourage litigation: *North Chicago etc. R. R. Co. v. Ackley*, 171 Ill. 100, 49 N. E. 222; and that champerty, being an offense against the common law, is presumed to be against the law of another state, if the contrary does not appear, in a suit brought by an attorney in this state to obtain a percentage of his

client's recovery in another state, brought about through the attorney's efforts, but where champerty is prohibited in such other state: *Thurston v. Percival*, 1 Pick. 415.

On the other hand, the weight of authority supports the proposition that a client's agreement with his attorney to give the latter a certain per cent or designated part of the subject matter in litigation, in case of success, and nothing if there is no recovery, is not deemed to be champertous: *Major v. Gibson*, 1 Pat. & H. 48; *Schomp v. Schenck*, 40 N. J. L. 195, 29 Am. Rep. 219; *Croco v. Oregon Short Line R. R. Co.*, 18 Utah, 311, 54 Pac. 985; *Martinez v. Succession of Vives*, 32 La. Ann. 305; *Bentinck v. Franklin*, 38 Tex. 458; *Nickels v. Kane*, 82 Va. 309; *McPherson v. Cox*, 96 U. S. 404; *Wylie v. Coxe*, 15 How. 415; *Moody v. Harper*, 38 Miss. 599; *Hassell v. Van Houten*, 39 N. J. Eq. 105; *Fowler v. Callan*, 102 N. Y. 395, 7 N. E. 169; *Wright v. Tebbitts*, 91 U. S. 252. It is not champertous, nor is it maintenance, for a client to agree to give his attorney a sum "equal" to one-tenth or one-fourth of the amount recovered: *Evans v. Bell*, 6 Dana, 479; *Ramsey v. Trent*, 10 B. Mon. 336; or for the attorney to rely upon an agreement that he shall be first paid from the funds recovered: *Christie v. Sawyer*, 44 N. H. 298; or for the parties to agree that the attorney shall investigate the records of titles to real estate, decide between conflicting titles as to which is best, acquire such titles, prosecute for their recovery, and, if successful, to divide the profits, the attorney furnishing the skill and the client the capital: *Newkirk v. Cone*, 18 Ill. 449; "yet it would certainly be very wrong for attorneys to become mere jobbers and speculators, to hunt up rotten titles and ferment litigation": *Bentinck v. Franklin*, 38 Tex. 458, 473.

It is not champertous for an attorney to agree to take his compensation for the purchase of property out of land which is not in litigation: *Joy v. Metcalf*, 161 Mass. 514, 37 N. E. 671. An agreement by which a defendant in attachment assigns to his attorney the property attached, in consideration of his services in the suit, and in prosecuting a contemplated action of damages on account of the attachment, stipulating for his own diligence in the attachment suit, and giving the attorney the entire management and control, is not void for champerty or maintenance: *Ware v. Russell*, 70 Ala. 174, 45 Am. Rep. 82. A contract to pay an attorney for his services in suits concerning land, if it is recovered, a specific sum of money out of the proceeds, when it shall be sold by the client, is not champertous, because he neither pays costs nor accepts the land, or any part of it, as his compensation: *McPherson v. Cox*, 96 U. S. 405. It is not champertous for a client to agree to give or allow and to pay his attorney the first fifty dollars collected by him in a suit: *Scott v. Harmon*, 109 Mass. 237, 12 Am. Rep. 685; nor is it champertous for an administrator to contract with an attorney, whereby the latter is given an interest in the proceeds of a claim to be sued on, with full power to compromise it if the at-

torney sees fit: *Jeffries v. Mutual Life Ins. Co.*, 110 U. S. 305, 4 Sup. Ct. Rep. 8. An attorney's guaranty of a claim left with him for collection does not savor of champerty or maintenance: *Gregory v. Gleed*, 33 Vt. 405. In California a contract to pay an attorney a percentage, contingent upon success, is not void as against good morals or public policy: *Bergen v. Frisbie*, 125 Cal. 168, 57 Pac. 784; *Howard v. Throckmorton*, 48 Cal. 482; and in Utah and Michigan, the statute has modified the force and effect of the common law as to champertous contracts, and left the mode and manner of compensation of attorneys to agreement between the parties: *Potter v. Ajax Min. Co.*, 22 Utah, 273, 61 Pac. 999; *Croco v. Oregon Short Line R. R. Co.*, 18 Utah, 311, 54 Pac. 985; *Kennedy v. Oregon Short Line R. R. Co.*, 18 Utah, 325, 54 Pac. 988; *Willey v. Crane*, 63 Mich. 720, 30 N. W. 327.

A contract to pay an attorney for his services a certain portion of the recovery, contingent entirely upon his success in the suit, is not champertous, but valid: *McDonald v. Chicago etc. R. R. Co.*, 29 Iowa, 170; *Newkirk v. Cone*, 18 Ill. 449; *Jewel v. Neidy*, 61 Iowa, 299, 16 N. W. 141; *Stewart v. H. & T. C. Ry. Co.*, 62 Tex. 246; *Jeffries v. Mutual Life Ins. Co.*, 110 U. S. 305, 4 Sup. Ct. Rep. 8; *Cross v. Bloomer*, 6 Baxt. 74; unless some unfair advantage is taken of the client: *Davis v. Webber*, 66 Ark. 190, 74 Am. St. Rep. 81, 49 S. W. 822. But while an attorney has a right to contract for a contingent fee, or for a percentage upon the amount recovered, he cannot lawfully purchase a claim upon the consideration that he will prosecute it in his own name for a part of the amount recovered: *Dahms v. Sears*, 13 Or. 47, 11 Pac. 891. A contract made after a suit is determined to pay an attorney out of moneys collected in such suit is not champertous: *Walker v. Cuthbert*, 10 Ala. 213. A contract between attorney and client that the former is to have half the amount of a judgment for collecting it is not within the law against champerty, if made after final judgment: *Floyd v. Goodwin*, 8 Yerg. 484, 29 Am. Dec. 130.

According to the common law, as generally recognized in the United States, wherever it has not been generally modified by statute, an agreement by an attorney to prosecute at his own expense a suit, in the subject matter of which he personally has and claims no interest, present or contingent, in consideration of receiving a specified part of what he may recover, is champertous and void, and such contracts have, therefore, been held in the following cases to be champertous, unenforceable, and void; *Peck v. Heurich*, 167 U. S. 624, 17 Sup. Ct. Rep. 927; *Stearns v. Felker*, 28 Wis. 594; *Kelly v. Kelly*, 86 Wis. 170, 56 N. W. 637; *Miles v. Mutual etc. Life Assn.*, 108 Wis. 421, 84 N. W. 159; *Gilbert v. Holmes*, 64 Ill. 548; *Huber v. Johnson*, 68 Minn. 74, 64 Am. St. Rep. 456, 70 N. W. 806; *In re Evans*, 22 Utah, 366, 62 Pac. 913; *Nelson v. Evans*, 21 Utah, 202, 60 Pac. 557; *Croco v. Oregon Short Line R. R. Co.*, 18 Utah, 311, 54 Pac. 985; *Atchison etc. R. R. Co. v. Johnson*, 29 Kan. 218; *Martin v. Clarke*, 8 R. I. 389, 5 Am. Rep. 586; *Taylor v. Hinton*, 66 Ga. 743;

Geer v. Frank, 179 Ill. 570, 53 N. E. 965; Gammons v. Johnson, 76 Minn. 76, 78 N. W. 1035; Thompson v. Reynolds, 73 Ill. 11; Boardman v. Thompson, 25 Iowa, 487; Hyatt v. Burlington etc. Ry. Co., 68 Iowa, 662, 27 N. W. 815; Low v. Hutchinson, 37 Me. 196; Belding v. Smythe, 138 Mass. 530; Lancy v. Havender, 146 Mass. 615, 16 N. E. 464; Hayney v. Coyne, 10 Heisk. 339; Johnson v. Van Wyck, 4 App. Cas., D. C., 294. That such a contract is void for maintenance, see Quigley v. Thompson, 53 Ind. 317. Under a statute providing that all contracts made in consideration of services to be rendered in the prosecution or defense, in or out of court, of any suit by any person not a party on record in such suit, whereby any part of the thing sued for is to be received by such person for his services or assistance, shall be void, it is not necessary that an action should be pending to render the contract champertous and void: Roberts v. Yancey, 94 Ky. 243, 42 Am. St. Rep. 357, 21 S. W. 1047.

But as it is an essential element of a champertous contract that the attorney is to contribute to the expenses of the litigation, for a part of the thing in dispute, or some profit out of it: Duke v. Harper, 66 Mo. 51, 27 Am. Rep. 314; Jewel v. Neidy, 61 Iowa, 299, 16 N. W. 141; Allard v. Lamirande, 29 Wis. 502; Moody v. Harper, 38 Miss. 599; monographic note to Bowman v. Phillips, 13 Am. St. Rep. 299, on what contracts of attorneys are void as against public policy; a contract between an attorney and client that the former is to receive as compensation for his services a specified part of the subject matter of litigation is not champertous, but valid, if the attorney does not agree to conduct the suit at his own expense: Duke v. Harper, 66 Mo. 51, 27 Am. Rep. 314; Moody v. Harper, 38 Miss. 599; Jeffries v. Mutual Life Ins. Co., 110 U. S. 305, 4 Sup. Ct. Rep. 8; Aultman v. Waddle, 40 Kan. 195, 19 Pac. 730; Richards v. Thompson, 43 Kan. 209, 23 Pac. 106; Jewel v. Neidy, 61 Iowa, 299, 16 N. W. 141; Allard v. Lamirande, 29 Wis. 502; Dockery v. McLellan, 93 Wis. 381, 67 N. W. 733; West Chicago Park Commrs. v. Coleman, 108 Ill. 591; Nickels v. Kane, 82 Va. 309; McPherson v. Cox, 96 U. S. 404; and in some jurisdictions even the attorney's payment of costs and expenses, or his agreement to do so, does not render such a contract champertous: Hoffman v. Vallejo, 45 Cal. 564; Wildey v. Crane, 63 Mich. 720, 30 N. W. 320; Hassell v. Van Houten, 39 N. J. Eq. 105; especially where the contract between the parties for the attorney's compensation contains an agreement that, in case of the attorney's failure to win, the costs and expenses advanced by the attorney shall, in whole or in part, be returned by the client to his attorney: Wallace v. Chicago etc. Ry. Co. (Iowa, Dec., 1900), 84 N. W. 662; Reece v. Kyle, 49 Ohio St. 475, 31 N. E. 747. A contract that the attorney shall have for his compensation a specified portion of the recovery, the attorney to pay no costs or expenses, except his own personal expenses, is not champertous: Winslow v. Central Iowa Ry. Co., 71 Iowa, 197, 32 N. W. 330. An

attorney may, in Arkansas, purchase of his client an interest in the subject matter of litigation, in consideration of services rendered and to be rendered in the prosecution of the suit, and become bound for the costs in the prosecution of his own and client's rights, without violating any law of champerty in that state: *Lytle v. State*, 17 Ark. 608, 679; and an agreement by an attorney to put up costs and expenses in the prosecution of a case in which he is interested as a party is not champertous: *Gilbert-Arnold Land Co. v. O'Hare*, 93 Wis. 194, 67 N. W. 38; *Lewis v. Brown*, 36 W. Va. 1, 14 S. E. 444. Anyone, including an attorney, may advance money to a poor man, to enable him to carry on his suit, without violating the law of champerty and maintenance: *Perine v. Dunn*, 3 Johns. Ch. 508; *Bristol v. Dann*, 12 Wend. 142, 27 Am. Dec. 122; *Hassell v. Van Houten*, 39 N. J. Eq. 105. "It is not against public policy," says Miner J., in *Potter v. Ajax Min. Co.*, 22 Utah, 273, 61 Pac. 999, "for an attorney to loan his client money with which to pay costs of suit, nor to advance the money necessary to carry on the suit as needed, when such advances are made as a loan, with the express or implied understanding or agreement for its repayment, and there is no contract of indemnity against the client's liability to pay costs. A contrary rule would embarrass the profession in its legitimate practice, and render attorneys a constant mark for dishonest clients."

A barratrous contract is void as against public policy. Thus, a contract between attorney and client whereby the latter is to canvass certain counties of the state, to hunt up claims of land owners against railroad companies for failing to fence their roads across the lands of such parties, and to institute suits on such claims against the railroad companies, after having blank contracts signed authorizing the employment of the former as attorney, and the attorney is to bring suit at his own expense, indemnify the party against the expenses of litigation, accept a share of the recovery, if any, for his compensation, and to charge nothing for his services if he does not succeed, and which contract forbids any compromise of the case without the attorney's consent, is peculiarly obnoxious to public policy, as involving champerty, maintenance, and barratry: *Gammons v. Johnson*, 76 Minn. 76, 78 N. W. 1035; *Gammons v. Gulbranson*, 78 Minn. 21, 80 N. W. 779. In this case the canvasser went over a number of counties and procured over seventy persons, including the defendant, to sign such contracts, but in an action by the attorney to recover compensation under such a contract, the court said: "The old common-law rules on the subject of champerty have doubtless been much modified, but the essential principle upon which those rules rested, and the evils and abuses at which they were aimed, still exist. The general purpose of the law against champerty and maintenance and barratry was to prevent officious intermeddlers from stirring up strife and contention

by vexatious or speculative litigation, which would disturb the peace of society, lead to corrupt practices, and prevent the remedial process of the law. All contracts or practices which necessarily and manifestly tend to produce these results ought still to be held void on grounds of public policy. It is doubtless the more modern doctrine that the mere taking a case on a contingent fee does not constitute champerty, and that it is not unlawful for an attorney to carry on a suit for another for a share of what may be recovered, at least unless he assumes the risks of litigation by indemnifying his client against all costs and expenses of the same. But the vice in the conduct of these parties lies deeper and much further back than merely entering into a champertous contract for their compensation for lawful services performed in the prosecution of suits legitimately instituted. According to the facts alleged and offered to be proved, it consisted of an unlawful and barratrous systematic scheme to work up and instigate wholesale, vexatious litigation in the names of parties and concerning subjects to whom and which they were entire strangers, and in which they had no interest, except a speculative one in the pecuniary profit which they might derive from the litigation which they had instigated, and which in all probability never would have been instituted except for their officious intermeddling." The transaction was held to be an illegal, barratrous scheme, and against public policy: *Gammons v. Johnson*, 76 Minn. 76, 78 N. W. 1035; *Gammons v. Gulbranson*, 78 Minn. 21, 80 N. W. 779; and see *Huber v. Johnson*, 63 Minn. 74, 64 Am. St. Rep. 456, 70 N. W. 806.

An attorney does not forfeit his right to full compensation for services by entering into a champertous agreement with his client, but may ordinarily recover therefor on a quantum meruit, notwithstanding the contract: *Rust v. Larue*, 4 Litt. 412, 14 Am. Dec. 172; *Stearns v. Felker*, 28 Wis. 594; *Thurston v. Percival*, 1 Pick. 415; *Caldwell v. Shepherd*, 6 T. B. Mon. 389; *Polsley v. Anderson*, 7 W. Va. 202, 23 Am. Rep. 613; *Gammons v. Johnson*, 69 Minn. 488, 72 N. W. 563; and the client is entitled to the fruits of the litigation after paying such reasonable compensation: *Stearns v. Felker*, 28 Wis. 594. When the fact that an action is being prosecuted under a champertous agreement comes to the knowledge of the court in any proper manner, the action may be dismissed: *Kelly v. Kelly*, 86 Wis. 170, 56 N. W. 637; *Norris v. Evans*, 15 Ky. Law Rep. 77, 22 S. W. 328; but a champertous contract between attorney and client does not affect the right of the client to prosecute his action against the defendant in the suit for the prosecution of which the champertous agreement was made, so long as no effort is made to enforce such champertous agreement, or to derive any benefit from it: *Pennsylvania Co. v. Lombardo*, 49 Ohio St. 1, 29 N. E. 573; and see *Atchison etc. R. R. Co. v. Johnson*, 29 Kan. 218. A champertous agreement should not be considered in estimating the value of an attorney's services

actually rendered: *Holloway v. Lowe*, 1 Ala. 246; and in *Ackert v. Barker*, 131 Mass. 436, a client was allowed to maintain an action for money had and received against an attorney for the whole amount recovered under a contract void for champerty and maintenance, less the costs paid by him: See *Dumont v. Dufore*, 27 Ind. 263. But a party to a barratrous scheme cannot abandon his original express contract and sue on a quantum meruit for services rendered in the litigation. The rule that an attorney may, notwithstanding a champertous contract for compensation, recover the reasonable value of his services lawfully performed, in litigation legitimately instituted, does not apply in such a case, because the vice is not merely in the contract for compensation, but in the unlawful and vexatious scheme by which the litigation itself was worked up and instigated: *Gammons v. Johnson*, 76 Minn. 76, 78 N. W. 1035; *Gammons v. Gulbranson*, 78 Minn. 21, 80 N. W. 779, above cited in this subdivision, where the facts of such scheme are stated, and distinguishing *Gammons v. Johnson*, 69 Minn. 488, 72 N. W. 563. See, also, *Huber v. Johnson*, 68 Minn. 74, 64 Am. St. Rep. 456, 70 N. W. 806.

A champertous agreement between the plaintiff and his attorney is no defense to the action against the defendant: *Burnes v. Scott*, 117 U. S. 582, 6 Sup. Ct. Rep. 865; *Cleveland etc. Ry. Co. v. Davis*, 10 Ind. App. 342, 36 N. E. 778, 37 N. E. 1069; *Omaha etc. Ry. Co. v. Brady*, 39 Neb. 27, 57 N. W. 767; *Chamberlain v. Grimes*, 42 Neb. 704, 60 N. W. 948; *Croco v. Oregon Short Line R. R. Co.*, 18 Utah, 311, 54 Pac. 985; *Robison v. Beall*, 26 Ga. 17; *Small v. Chicago etc. R. R. Co.*, 55 Iowa, 582, 8 N. W. 437; *Zeigler v. Mize*, 132 Ind. 403, 31 N. E. 945; *Gage v. Du Puy*, 137 Ill. 652, 24 N. E. 541, 26 N. E. 386; *Connecticut etc. Ins. Co. v. Way*, 62 N. H. 622. It is no ground for abatement of the action: *Allison v. Chicago etc. R. R. Co.*, 42 Iowa, 274; *Missouri Ry. Co. v. Smith*, 60 Ark. 221, 29 S. W. 752. The fact that the contract is void does not affect the client's right to recover against his debtor: *Wehmhoff v. Rutherford*, 98 Ky. 91, 32 S. W. 288. Contra, showing when the defendant, after a compromise, may treat a champertous contract as void: *Atchison etc. R. R. Co. v. Johnson*, 29 Kan. 218. The defense of champerty can only be set up when the champertous contract itself is sought to be enforced, and is available only, if at all, to the plaintiff in a suit against him on the contract: *Straw-Elsworth Mfg. Co. v. Cain*, 20 Wash. 351, 55 Pac. 321; *Courtright v. Burnes*, 13 Fed. 317; *Cleveland etc. Ry. Co. v. Davis*, 10 Ind. App. 342, 36 N. E. 778, 37 N. E. 1069; *Omaha etc. Ry. Co. v. Brady*, 39 Neb. 27, 57 N. W. 767. A stranger to a contract affected with champerty cannot make that defense against it: *Davis v. Settle*, 43 W. Va. 17, 26 S. E. 557. A champertous contract between a plaintiff and his attorney, affecting the proceeds to be recovered in a suit, does not permit the defendant to avoid a legal obligation: *Potter v. Ajax Min. Co.*, 22 Utah, 275, 61 Pac. 999; and a defendant, on the trial,

cannot inquire whether the arrangement between the plaintiff and his attorney, as to the latter's compensation, is champertous: *McLimans v. Lancaster*, 63 Wis. 596, 23 N. W. 689; *Denman v. Johnston*, 85 Mich. 387, 48 N. W. 565; unless, perhaps, for the purpose of affecting the credibility of the attorney, if he offers himself as a witness: *Denman v. Johnston*, 85 Mich. 387, 48 N. W. 565. But champerty between the plaintiff and his attorney may be shown by the plaintiff: *Belding v. Smythe*, 138 Mass. 530; and champerty is no defense to an action against an attorney at law for negligence and want of skill: *Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134.

Contracts for Contingent Fees.—An attorney's compensation may be made contingent upon his success, and be made payable by percentage or otherwise of the proceeds of the litigation. Such contracts are common, and while their propriety has been vehemently debated, they are not illegal as contrary to public policy or otherwise, and, when fairly made, are steadily enforced: *Fowler v. Callan*, 102 N. Y. 395, 7 N. E. 169; *Croco v. Oregon Short Line R. R. Co.*, 18 Utah, 311, 54 Pac. 985; *Davis v. Webber*, 66 Ark. 190, 74 Am. St. Rep. 81, 49 S. W. 822; *Rector v. Rose*, 62 Ark. 279, 36 S. W. 898; *Hoffman v. Vallejo*, 45 Cal. 564; *Bergen v. Frisbie*, 125 Cal. 168, 57 Pac. 784; *Newkirk v. Cone*, 18 Ill. 449; *Funk v. Mohr*, 185 Ill. 395, 57 N. E. 2; *North Chicago etc. R. R. Co. v. Ackley*, 58 Ill. App. 572; *Jewel v. Neidy*, 61 Iowa, 299, 16 N. W. 141; *Louisville Gas Co. v. Hargis*, 17 Ky. Law Rep. 1190, 33 S. W. 946; *Martinez v. Succession of Vives*, 32 La. Ann. 305; *Cain v. Warford*, 33 Md. 23; *Blaisdell v. Ahern*, 144 Mass. 393, 59 Am. Rep. 99, 11 N. E. 681; *Davis v. Commonwealth*, 164 Mass. 241, 41 N. E. 292; *County of Chester v. Barber*, 97 Pa. St. 455; *Perry v. Dicken*, 105 Pa. St. 83, 51 Am. Rep. 181; *Fellows v. Smith*, 190 Pa. St. 301, 42 Atl. 678; *Wheeler v. Riviere* (Tex. Civ. App., Feb. 1899), 49 S. W. 697; *Lewis v. Broun*, 36 W. Va. 1, 14 S. E. 444; *Gilchrist v. Brande*, 58 Wis. 184, 15 N. W. 817; *Dale v. Richards*, 21 D. C. 312; *Ex parte Plitt*, 2 Wall. Jr. 453, Fed. Cas. No. 11,228. Thus, an agreement to pay a proctor in an admiralty case, out of the proceeds of a recovery is valid and enforceable: *The Alice Strong*, 57 Fed. 249; and there is nothing illegal, immoral, or against public policy, in an agreement by an attorney for a contingent fee or a share of the proceeds, to present and prosecute claims against the United States: *Taylor v. Bemiss*, 110 U. S. 42, 3 Sup. Ct. Rep. 441; *Stanton v. Embrey*, 93 U. S. 548; *Manning v. Perkins*, 85 Me. 172, 26 Atl. 1015. A contract to pay an attorney a percentage of the value of the subject matter in litigation to secure "a favorable" decision from the land department is not contrary to good morals or public policy: *Bergen v. Frisbie*, 125 Cal. 168, 57 Pac. 784. An agreement for a contingent fee does not make the attorney a party to the action: *Gilchrist v. Brande*, 58 Wis. 184, 15 N. W. 817; nor does his agreement for a certain percentage of recovery make him a necessary party plaintiff, and he need not be joined as such: *McDonald v.*

Chicago etc. R. R. Co., 20 Iowa, 124, 96 Am. Dec. 114. A conditional obligation to pay an attorney an extra fee in case of success, in an action in which the obligor is not a party, is given upon a valid and sufficient consideration, if such obligor is a party to other suits in which the same question is involved: *Clay v. Ballard*, 9 Rob. (La.) 308, 41 Am. Dec. 328.

An attorney's contingent fee of five-twelfths of whatever the client may "realize" out of certain litigation means five-twelfths of the gross amount recovered, without deduction for the expense of litigation or settlement attending the transaction: *Funk v. Molr*, 185 Ill. 395, 57 N. E. 2. His agreement to collect bonds for twenty-five per cent of the "amount made" entitles him to one-fourth of the amount collected on the bonds by suit or otherwise: *Larned v. Dubuque*, 86 Iowa, 166, 53 N. W. 105; but where the client agrees to pay a fee of fifty dollars, and also a percentage of the damages which he may recover in the action, he is answerable only for a percentage of the damages received, not for such percentage of the judgment obtained: *Fisher v. Mylins*, 42 W. Va. 638, 26 S. E. 309. If the compensation agreed upon is contingent on the successful result of the suit, the measure of damages is not the contingent fee, but the reasonable value of the services rendered by the attorney: *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797. A contract for a contingent fee made by the mother and sole next of kin of a decedent, though binding on her, does not bind her descendants, nor the estate toward which she stands in no other relation than that of distributee: *Sloan's Estate*, 161 Pa. St. 237, 28 Atl. 1084.

Under some circumstances an attorney having a contract for a contingent fee may recover on a quantum meruit. Thus, where an attorney made a special contract to prosecute a suit for a certain fixed fee and a further contingent fee in case of success, and the client afterward dismissed the case without the attorney's consent, the attorney is not entitled to recover the whole contingent fee, but can recover, either on a special count or quantum meruit, reasonable value for his services: *Polsley v. Anderson*, 7 W. Va. 262, 23 Am. Rep. 613. So in case of a special contract for legal services for a percentage of the recovery, where the services are wrongfully prevented by the client, and where the attorney holds himself continually ready to serve, he may claim the whole compensation agreed on, subject to such abatement as would, in the natural course of things, have been incurred by him if the services had been continued: *Prodie v. Watkins*, 33 Ark. 545, 34 Am. Rep. 49. Where the complete performance of an attorney's services has been rendered impossible, or otherwise prevented, by the client, the attorney may, as a rule, recover on a quantum meruit, for the services rendered by him: *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797; but a lawyer who has violated his contract for a contingent fee cannot recover on a quantum meruit without showing

the performance of services, and that those services were of benefit to his client: *Moyers v. Graham*, 15 Lea, 57. If an attorney is employed by a county to prosecute an action against a county officer to recover moneys alleged to be illegally retained, under an agreement whereby his compensation is made contingent upon the success of the suit, and he is discharged before the termination of the suit, he cannot recover damages for the breach of the contract of employment, where it appears that the suit ought not to have resulted in favor of the county had it been prosecuted to judgment: *Swinerton v. Monterey Co.*, 76 Cal. 113, 18 Pac. 135.

While a contract for a contingent fee is not illegal where the suit is of a legitimate character, it is otherwise where the employment of the attorney is of an unlawful character. Thus, if he agrees to prosecute a suit on a contingent fee and bear the costs and expense of litigation, the agreement is champertous and cannot be enforced in law or in equity. So his agreement to prosecute a suit on a contingent fee is void, if part of the consideration for his undertaking is that another attorney shall render his services and bear the costs and expense of litigation: *Geer v. Frank*, 179 Ill. 570, 53 N. E. 965. An attorney may recover compensation for purely professional services in procuring legislation in which his client is interested; but when the agreement between attorney and client provides for compensation contingent on the amount recovered under such legislation when procured by the attorney, the contract is against public policy and cannot be enforced: *Spalding v. Ewing*, 149 Pa. St. 375, 34 Am. St. Rep. 608, 24 Atl. 219; *Trist v. Child*, 21 Wall. 441. A contract to give an attorney a certain percentage of a claim against the United States government for services in collecting it is void as against public policy, when such services consist in procuring legislation compelling the payment of the claim: *Spalding v. Ewing*, 149 Pa. St. 375, 34 Am. St. Rep. 608, 24 Atl. 219; *Trist v. Child*, 21 Wall. 441. So, if the valid part of an attorney's contract is blended and confused with the part which is forbidden, compensation cannot be recovered for either part, as the whole is a unit and indivisible, and that which is bad destroys the good: *Trist v. Child*, 21 Wall. 441. But unless there is something on the face of the contract which shows that the means and methods to be used by the attorney, or which were used by him, were improper, the presumption is that a contract for a contingent fee is valid and enforceable: *Bergen v. Frisbie*, 125 Cal. 168, 57 Pac. 784. Contracts for contingent fees will not be countenanced in proceedings for divorce or alimony. Such fees in these proceedings are vicious, because the law does not favor divorce, but does favor marriage, and will not sanction contracts intended to promote its dissolution by lending itself to their enforcement. All such contracts, in these cases, should be held illegal and void, as contrary to public policy: *Newman v. Freitas*, 129 Cal. 283, 61 Pac. 907; *Brindley v. Brindley*, 121 Ala. 429, 25

South. 751. So it has been held that the giving of contingent fees, or compensation for services rendered to the public, is contrary to sound policy, as where a county agrees to give attorneys a contingent fee to enable its commissioners to lawfully place upon the tax list certain lands which the assessor has erroneously left off of the assessment-roll. Such a contract is void as against public policy: *County of Platte v. Gerrard*, 12 Neb. 244, 11 N. W. 298.

Contracts as to Particular Services.—An attorney, as such, is not entitled to compensation for acting as a lobbyist: *Matter of Knapp*, 8 Abb. N. C. 308, 59 How. Pr. 367; *Trist v. Child*, 21 Wall. 441; nor are such services embraced in the employment of an attorney to conduct a suit: *Judah v. Trustees*, 16 Ind. 56. A contract between attorney and client, that the former shall render his professional services "in the courts of this state," in actions to test the validity of the latter's title to certain real estate, does not bind him to render services in a federal court, in an action brought therein to test the validity of the same title: *Mahoney v. Bergin*, 41 Cal. 423. If an attorney is employed to defend a person charged with crime, but a change of venue is had to another county, wherein the attorney obtains an allowance, as for a poor person, to be paid by the county wherein the indictment was found, such allowance covers only the value of the services rendered in the county to which the change was taken, and the attorney is entitled to recover for services rendered in the county wherein the indictment was found, and in the supreme court, on appeal: *Cheek v. Schwartz*, 70 Ind. 339.

If there is a general employment of an attorney for an agreed sum, it is error to tell the jury that no additional sum can be charged for services rendered under such employment, unless there was an express agreement to pay therefor: *Bartholomew v. Langsdale*, 35 Ind. 278. The fact there is a contract between attorney and client that the former shall perform certain services does not repel the presumption that the client has promised to pay the attorney for other services rendered at the client's request, although there has been no express promise to pay: *Isham v. Parker*, 3 Wash. 755, 29 Pac. 835. If an attorney has been employed by correspondence to attend to a case "in the supreme court," but the case has first to go to the "appellate court," and preparation is being made to take the case there, a court is justified in finding that the special contract related to the appellate court, and not the supreme court, where the whole correspondence between attorney and client showed that the services contracted for were services in the appellate court: *Sanders v. Seelye*, 128 Ill. 631, 21 N. E. 601.

A lawyer employed to assist in the collection of a debt cannot recover for twenty writs when only one is necessary, nor can he recover for term fees in the suits thus unnecessarily commenced: *Timberlake v. Crosby*, 81 Me. 249, 16 Atl. 896; and a client who employs a lawyer to try cases before commissioners at forty dollars

a case and guarantees two cases per week, is not liable to the attorney for any cases furnished to, but not tried by, him: *Smidt v. Dessar*, 34 N. Y. Supp. 158; 13 Misc. Rep. 254. An attorney's agreement to receive "what any gentleman of the bar would consider reasonable" is at most an agreement to arbitrate and does not bar an action: *Bank v. Martin*, 4 Ala. 615. An attorney who renders legal services for a railway company for a certain year may recover therefor although he was carried that year free of charge on an annual pass issued to him by the receiver of the company: *Ohio etc. Ry. Co. v. Smith*, 5 Ind. App. 36, 31 N. E. 371. An attorney's agreement to attend to the business of a bank, to the end of the current year, does not oblige him to attend to business unfinished at the end of the year: *Bank of Alabama v. Martin*, 4 Ala. 615. If he is employed by a bank for two years to make collections, he is entitled to his percentage on judgments obtained during the term of service, whether he received the money on them during the term or not: *State v. Hawkins*, 28 Mo. 366. An attorney who agrees to defend a person indicted for crime is not bound to defend a suit upon a scire facias on the forfeiture of the bond for his appearance to answer to the indictment: *Headley v. Good*, 24 Tex. 232. If the trustees of a copartnership contract with an attorney to prosecute and defend all suits for and against the firm growing out of the business carried on by the trustees, the contract does not cover a suit between beneficiaries of the company to adjust their respective rights, and in which the trustees, by reason of their office, are only incidentally involved: *McCutcheon v. Loud*, 71 Mich. 433, 39 N. W. 569. An order made by the school trustees of a city, authorizing the employment of an attorney to prosecute a county auditor for failing to pay over money due from him to the "school city" does not authorize the attorney to bring a civil suit to try the question as to who are the legal trustees, and the "school city" is not answerable for the attorney's compensation for such services: *Baldwin v. School City*, 73 Ind. 346. The employment, by a county, of an attorney, "in all matters pertaining to the building and construction of turnpikes and macadamized roads," and in "all matters thereto relating," includes the defense of a suit in equity to enjoin the commissioners from issuing bonds for the purpose of constructing the turnpikes and roads, and the attorney cannot recover additional compensation for his services in such a suit: *Lindsay v. Colbert County*, 112 Ala. 409, 20 South. 637. If, during the settlement of an estate, the administrator agrees to pay an attorney at the rate of five dollars a day for his services, and, in addition, an amount equal to five per cent of all he may save or make the estate by excepting to the settlements made by the commissioner, the attorney is not entitled to a commission on what is conceded to be owing to the estate, but only on what is secured, saved, or made to the estate by ex-

ceptions filed by the attorney: *Mellvoy v. Russell*, 15 Ky. Law Rep. 740, 12 S. W. 1067.

Compromise and Its Effect—Contracts not to Compromise.—The parties to a controversy may settle it, before judgment or before a lien has attached, without consulting the wishes of their attorneys, or even against their wishes: *Stephens v. Nashville etc. Ry.*, 10 Lea, 448; *Wright v. Wright*, 70 N. Y. 96; *Coughlin v. New York etc. R. R. Co.*, 71 N. Y. 443, 27 Am. Rep. 75; *Sullivan v. O'Keefe*, 53 How. Pr. 426; *Averill v. Longfellow*, 66 Me. 237; *Wood v. Anders*, 5 Bush, 601; *Connor v. Boyd*, 73 Ala. 385; *Swanston v. Morning Star Min. Co.*, 13 Fed. 215. A plaintiff has a right, in the exercise of good faith, to make such settlement of his suit as he may choose, though he has agreed to pay his attorney a contingent fee, or a percentage or part of the subject matter of litigation in case of recovery: *Kusterer v. Beaver Dam*, 56 Wis. 471, 43 Am. Rep. 725. 14 N. W. 617; *De Graffenreid v. St. Louis etc. Ry. Co.*, 66 Ark. 260, 50 S. W. 272; *Western Union Tel. Co. v. Semmes*, 73 Md. 9, 20 Atl. 127; *Miller v. Newell*, 20 S. C. 122, 47 Am. Rep. 833; *Coughlin v. New York etc. R. R. Co.*, 71 N. Y. 443, 27 Am. Rep. 75, and see the monographic note to *Hanna v. Island Coal Co.*, 51 Am. St. Rep. 262, on the lien of attorneys. The settlement, however, does not have the effect of depriving the attorney of all right to compensation: *Topeka Water Supply Co. v. Root*, 56 Kan. 187, 42 Pac. 715; *MacKie v. Howland*, 3 App. Cas., D. C., 461; *Weeks v. Wayne Circuit Judges*, 73 Mich. 256, 41 N. W. 269; *Duke v. Harper*, 8 Mo. App. 296; *Bartlett v. Odd Fellows' Sav. Bank*, 79 Cal. 218, 12 Am. St. Rep. 139, 21 Pac. 743; *Swift v. Register*, 97 Ga. 446, 25 S. E. 315; *Potter v. Ajax Min. Co.*, 22 Utah, 273, 61 Pac. 999. In fact, some of the cases hold that the attorney may recover the agreed compensation: *Millard v. Jordan*, 76 Mich. 131, 42 N. W. 1085; *Bogert v. Adams*, 8 Colo. App. 185, 45 Pac. 235; *Hill v. Cunningham*, 25 Tex. 26. In California, the compromise of litigation by a client does not affect the rights of his attorney under a contract for the conveyance of land as compensation. Neither a client nor the opposite party having knowledge of the attorney's rights can so compromise an action as to defeat the rights of the attorney in the subject matter of the action: *King v. Gildersleeve*, 79 Cal. 504, 21 Pac. 961. While an attorney cannot prevent a compromise by his client (*King v. Gildersleeve*, 76 Cal. 504, 21 Pac. 961), it must be borne in mind that a party must be heard in court through his attorney, where he has one, and that the court has no authority to recognize anyone in the conduct or disposition of the case except the attorneys of record: *Toy v. Haskell*, 128 Cal. 558, 79 Am. St. Rep. 70, 61 Pac. 89. A client cannot compromise where his attorney has a lien, without the latter's consent, so as to avoid the payment of his fee: *Pleasants v. Konrecht*, 5 Heisk. 694; *Larned v. Dubuque*, 86 Iowa, 166, 53 N. W. 105. If a suit has progressed to judgment, an attorney may establish his interest in such judgment re-

sulting from his services, and this neither party to the litigation can ignore. They may settle if they wish, but before there can be any satisfaction of the judgment, the attorney's fee must be paid: *Davis v. Webber*, 66 Ark. 190, 74 Am. St. Rep. 81, 49 S. W. 822.

In California and Wisconsin, a contract between attorney and client that the latter shall not compromise the suit is valid: *Hoffman v. Vallejo*, 45 Cal. 564; *Ryan v. Martin*, 16 Wis. 59. Thus, it is not against public policy in California for a lawyer to undertake to recover property, by legal proceedings, for a part of the property recovered, or obtained by reason of any compromise or settlement of the matter, and for the party claiming the property to agree not to make any settlement or compromise without the consent of the attorney: *Hoffman v. Vallejo*, 45 Cal. 564. But in other states a contract between an attorney and client whereby the latter is prevented from settling or discontinuing his suit is deemed to be void as tending to foster and encourage litigation, especially where the attorney is to have a share of the recovery as his compensation: *North Chicago etc. R. R. Co. v. Ackley*, 171 Ill. 100, 49 N. E. 222; *Davis v. Webber*, 66 Ark. 190, 74 Am. St. Rep. 81, 49 S. W. 822; *Key v. Vattler*, 1 Ohio, 132; *Boardman v. Thompson*, 25 Iowa, 487. Contracts which operate to prevent clients from settling their suits are not favored by the courts: *Ellwood v. Wilson*, 21 Iowa, 523; and the law of Ohio tolerates no lien, in general, which will prevent litigants from compromising or settling their controversies, or which tends to encourage, promote, or extend litigation: *Weakly v. Hall*, 13 Ohio, 167, 42 Am. Dec. 194. A contract under which a person who is a stranger to both parties to a disputed claim for damages agrees with the claimant to undertake to hire an attorney, and to prosecute a suit for the collection of the claim, entirely at his own cost and expense, for one-half of what he may collect on it, and the claimant agrees not to settle the claim without the written consent of the other party to the contract, and that if he does so settle he shall pay to such other party a fixed and arbitrary sum, regardless of the amount or value of the services rendered by the latter, is void, as against public policy, and champertous: *Huber v. Johnson*, 68 Minn. 74, 64 Am. St. Rep. 456, 70 N. W. 806; *Gammons v. Johnson*, 76 Minn. 76, 78 N. W. 1035. If a stipulation in a contract between attorney and client that the latter shall not compromise without the former's consent is not severable from the remainder of the contract, but was an inducement for entering into the contract, the whole instrument is void: *Davis v. Webber*, 66 Ark. 190, 74 Am. St. Rep. 81, 49 S. W. 822. An agreement by a client not to compromise his suit does not bind him, though he has agreed to give a percentage or other designated portion of a recovery to his attorney by way of compensation to the latter for his services: *Mosely v. Jamison*, 71 Miss. 456, 14 South. 529; *Lee v. Vacuum Oil Co.*, 126 N. Y. 579, 27 N. E. 1018; 126 N. Y. 670, 27 N. E. 1020; and

where a defendant with notice of the contract compromises with the plaintiff without the knowledge or consent of the latter's attorney, such defendant is not answerable to the plaintiff's attorney for the latter's share of the subject matter: *North Chicago etc. R. R. Co. v. Ackley*, 171 Ill. 100, 49 N. E. 222.

Gifts to Attorneys.—The presumption is, that a gift from a client to his attorney is not valid; and to establish such a gift, in whatever form the question may arise, it is incumbent upon the attorney to show affirmatively, not only that it was voluntary, but also that it was made with full knowledge on the part of the client of all material facts known to the attorney, and that it was not brought about by any undue influence, either actively exerted, or arising from the relation of attorney and client: *Whipple v. Barton*, 63 N. H. 613, 3 Atl. 922; *Nesbit v. Lockman*, 34 N. Y. 167; *Berrieu v. McLane*, Hoff. Ch. 421; *Phillips v. Overton*, 4 Hayw. (Tenn.) 291; *Gray v. Emmons*, 7 Mich. 533. A promise by a prisoner, during the relation of attorney and client, to confer upon his attorney a gratuity, in addition to a stipulated fee for defending him, is not binding and will not be enforced: *Marshall v. Dossett*, 57 Ark. 93, 20 S. W. 810. So, if a man is injured, and his claim is worth some four thousand dollars, but he gives it all, except three hundred and thirty dollars, to his lawyer, under the name of compensation for getting it, the transaction is merely a gift or so much as exceeds just compensation, and, if the man is indebted, it cannot stand as against his creditor: *Colgan v. Jones*, 44 N. J. Eq. 274, 18 Atl. 55. An agreement between attorney and client, while the relation continues, by which the former secures a gift on a larger compensation than was stipulated for when he undertook the business, is invalid, and its enforcement will be restrained: *Lecatt v. Sallee*, 3 Port. 115, 29 Am. Dec. 249.

Illegal Contracts—Illustrations.—It has been shown above that champertous agreements between attorney and client, agreements not to compromise, and barratrous contracts are contrary to public policy and void: See, also, *Huber v. Johnson*, 68 Minn. 74, 64 Am. St. Rep. 456, 70 N. W. 806; *Gammons v. Johnson*, 76 Minn. 76, 78 N. W. 1035; *Gammons v. Gulbranson*, 78 Minn. 21, 80 N. W. 779. Contracts by attorneys to advance costs and to pay the expenses of litigation are, according to the weight of authority, contrary to public policy and illegal: *Nelson v. Evans*, 21 Utah, 202, 60 Pac. 557; *In re Evans*, 22 Utah, 366, 62 Pac. 913; *Low v. Hutchinson*, 37 Me. 196; *Boardman v. Thompson*, 25 Iowa, 487; but see *Willey v. Crane*, 69 Mich. 17, 36 N. W. 734.

The monographic note to *Bowman v. Phillips*, 13 Am. St. Rep. 297-300, shows what contracts of attorneys are void as against public policy, and nothing more is required here than to cite a few additional cases. It is against public policy and illegal for an attorney to agree to protect a client in the commission of crime: *Bowman v. Phillips*, 41 Kan. 364, 13 Am. St. Rep. 292, 21 Pac. 230;

or to agree to render services to prevent the finding of an indictment against one accused or suspected of crime: *Weber v. Shay*, 56 Ohio St. 116, 60 Am. St. Rep. 743, 46 N. E. 377; or to so bind up a city by contract as to place it beyond the power of the city to establish a free ferry across a river, or to limit its charges as to tolls, while the attorney has, under such contract, a right for twenty years to one-third of the rents of the ferry privileges and ferries, or of the receipts of such ferries or bridges when not rented: *Waterbury v. Laredo*, 68 Tex. 565, 5 S. W. 81. A contract by a guardian to pay an attorney for legal services out of the estate in the former's hands, without an order of court, is invalid: *Morse v. Hinckley*, 124 Cal. 154, 56 Pac. 896. A lawyer's contract to divide fees with a third person if the latter will procure employment for him as an attorney is contrary to public policy and void: *Alpers v. Hunt*, 86 Cal. 78, 21 Am. St. Rep. 17, 24 Pac. 846; *Hirschbach v. Ketchum*, 5 App. Div. 324; 39 N. Y. Supp. 291; *Meguire v. Corwine*, 101 U. S. 108, 3 McAr. 81.

It is illegal for an attorney to buy a claim for prosecution, or to advance or agree to advance money, etc., to any person as an inducement to, or as a consideration for, the placing in his hands of a claim for collection: *Coughlin v. New York etc. R. R. Co.*, 71 N. Y. 443, 27 Am. Rep. 75; *Dahms v. Sears*, 13 Or. 47, 11 Pac. 891; *Allen v. Hawks*, 13 Pick. 79. So, if an attorney employs other attorneys to bring an action for damages for the death of his decedent, and he is afterward appointed administrator, he cannot make a contract with such attorneys for compensation in the case as assistant attorney, because his duties as assistant attorney are within the scope of his duties as administrator: *In re Evans*, 22 Utah, 366, 62 Pac. 913. If an attorney promises his client, while the action is pending, to indemnify him against the legal consequences of it, the promise is without consideration, and an action cannot be maintained thereon: *Mitchell v. Bell*, Conf. 17, 2 Am. Dec. 627. If an attorney having a debt for collection promises his client to pay the debt himself if he fails to collect, such promise, if supported by a sufficient consideration, is valid and binding. The client's confidence in his attorney, or his simple acquiescence in proceedings taken by the latter, is not a sufficient consideration, but if, upon the faith of such a promise, the client agrees not to withdraw the business from the attorney, or consents to forbear taking proceedings which, but for the promise, would have secured the debt, then the client can maintain an action against the attorney on the promise: *Morrill v. Graham*, 27 Tex. 646. When an agreement between attorney and client is had, without the attorney informing the client of all the facts and circumstances attending the subject of the controversy, the contract is presumptively fraudulent, and the attorney seeking to recover thereon must state facts sufficient to remove the presumption of fraud: *Ryan v. Ashton*, 42 Iowa, 365; *Planters' Bank v. Hornberger*,

4 Cold. 531. An attorney ought not to recover upon a demand for services rendered in "securing evidence" for a contemplated suit for separation, between a man and his wife, which is never brought: Succession of Elliott, 28 La. Ann. 183. An attorney will not be permitted, after having once acted as such in the prosecution of a suit, and after having had opportunities for knowing the facts of his client's case, to go over and render assistance to the adverse side, and enforce, in a court of equity, a contract based on such assistance: Valentine v. Stewart, 15 Cal. 387, 401.

Legal Contracts—Illustrations.—It has been shown above that a contract by an attorney for a contingent fee, or for a designated portion of the recovery, is not against law or public policy, but legal, unless he agrees to advance costs or to pay expenses: See, also, Newkirk v. Cone, 18 Ill. 449; Bergen v. Frisbie, 125 Cal. 168, 57 Pac. 784; Bachman v. Lawson, 109 U. S. 659, 3 Sup. Ct. Rep. 479; Burbridge v. Fackler, 2 McAr. 407; Rickel v. Chicago etc. Ry. Co. (Iowa, Oct. 1900), 83 N. W. 957; Wright v. Tebbitts, 91 U. S. 252; Mahoney v. Bergin, 41 Cal. 423; Mumma's Appeal, 127 Pa. St. 474, 18 Atl. 6. It is no valid objection to a decree for the specific performance of an attorney's contract for a portion of the property in controversy as his compensation that the property, subsequent to the agreement, enhanced in value, and that the enhanced value was, in a material degree, the result of the labor and money of the client: Howard v. Throckmorton, 48 Cal. 482. A county may lawfully employ counsel to question the validity of its bonds, for the benefit of the public, in a suit to which it is not a party: County of Franklin v. Layman, 145 Ill. 138, 33 N. E. 1094; and it has been held that an attorney may take security from his client for past and future services, if fairly done: Hall v. Crouse, 13 Hun, 557. The English rule which prohibits attorneys from taking, in advance, a security for the payment of the future costs of the litigation is not in force in New York: Hall v. Crouse, 13 Hun, 557. An attorney cannot, during the litigation, secure himself at the expense of his client: Taylor v. Barker, 30 S. C. 238, 9 S. E. 115; but a note and mortgage given by a client to his attorney to secure payment for the latter's professional services will be upheld, where the transaction was fair, although the security was taken while the relation of attorney and client existed, but the onus of proving its fairness is on the attorney: Wharton v. Hammond, 20 Fla. 534. A married woman whose separate property has been attached in a suit against her husband may lawfully contract for the services of an attorney in securing its release; and she may pledge her personal credit for such purpose: Thresher v. Barry, 69 Conn. 470, 37 Atl. 1064. A widow has a right to employ counsel to bring ejectment, and to make an agreement with him concerning his compensation: Matter of Hynes, 105 N. Y. 560, 12 N. E. 60; and a religious society may lawfully employ an attorney: Cicotte v. St. Anne's Church, 60 Mich. 552, 27 N. W. 682. The law prohibiting assignments of demands to

attorneys, so that the latter may bring suit thereon does not apply to a mechanic's lien, assigned merely for the purpose of collection, and to avoid expense and a multiplicity of suits: *Smedley v. Dregge*, 101 Mich. 200, 59 N. W. 411. If there is nothing in the contract itself, between attorney and client, or in the circumstances attending its execution, which should lead a court to refuse to sustain an action thereon, it will be upheld: *Ryan v. Martin*, 18 Wis. 672; and an attorney may recover upon a valid contract with his client, if he has not abandoned it, and the burden of showing abandonment is on the defendant: *Craddock v. O'Brien*, 104 Cal. 217, 37 Pac. 896. The contract of an attorney for services as such before a department of government or a legislative body, is valid, but his contract for lobby services is void, and where it is for both, the entire contract is vitiated: *McBratney v. Chandler*, 22 Kan. 692, 31 Am. Rep. 213; *Weed v. Black*, 2 McAr. 268, 29 Am. Rep. 618. If third persons wish to reorganize an insolvent corporation, and employ an attorney thereof, who is also a director therein, to buy up the claims of its creditors, the attorney's relation to the company requires of him the utmost good faith toward the creditors in his dealings with them, but the attorney's failure to inform them of the contemplated reorganization does not constitute a fraud upon them on his part, where they have received the full value of their claims: *Powell v. Willamette etc. R. R. Co.*, 15 Or. 393, 15 Pac. 663.

Requirements in Dealings, Generally.—In matters other than those concerning fees, an attorney and client are not absolutely prohibited by law from contracting with each other, nor does the law declare all such contracts either void or voidable, but such a transaction is closely scrutinized by the courts, and often declared to be voidable, when it would be deemed unobjectionable between other parties: *Rolfe v. Rich*, 149 Ill. 436, 35 N. E. 352; *Gibson v. Jeyes*, 6 Ves. 266, 277; *Pisani v. Attorney General*, L. R. 5 P. C. 517; *Miles v. Ervin*, 1 McCord Eq. 524, 16 Am. Dec. 623; *Felton v. Le Br ton*, 92 Cal. 457, 28 Pac. 490; *Mills v. Mills*, 26 Conn. 213; *Bibb v. Smith*, 1 Dana, 582; *Morrison v. Smith*, 130 Ill. 304, 23 N. E. 241; *Starr v. Vanderheyden*, 9 Johns. 253, 6 Am. Dec. 275; *Elmore v. Johnson*, 143 Ill. 513, 36 Am. St. Rep. 401, 32 N. E. 413. The burden is, therefore, upon the attorney to show that the contract with his client, in a matter of advantage to himself, was fair and equitable; that the client was fully informed of his rights and interests in the subject matter of the transaction, and the nature and effect of the transaction itself, and was so placed as to be able to deal with the attorney at arm's length: *Kisling v. Shaw*, 33 Cal. 425, 91 Am. Dec. 644; *Rolfe v. Rich*, 149 Ill. 436, 35 N. E. 352; *Pisani v. Attorney General*, L. R. 5 P. C. 517; *Lewis v. J. A.*, 4 Edw. Ch. 599; *Tancre v. Reynolds*, 35 Minn. 476, 29 N. W. 171; *Porter v. Bergen* (N. J., June, 1896), 34 Atl. 1067; *Howell v. Ransom*, 11 Paige, 538; *Planters' Bank v. Hornberger*, 4 Cold. 564; *Felton v. Le Breton*, 92

Cal. 457, 28 Pac. 490; *Cox v. Delmas*, 99 Cal. 104, 33 Pac. 836; *Miller v. Whelan*, 158 Ill. 544, 42 N. E. 59; *Morrison v. Smith*, 130 Ill. 304, 23 N. E. 241; *Rochester v. Levering*, 104 Ind. 562, 4 N. E. 203; *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797; *Brown v. Bulkley*, 14 N. J. Eq. 451; *Poillon v. Martin*, 1 Sand. Ch. 569; *Bingham v. Salene*, 15 Or. 208, 3 Am. St. Rep. 152, 14 Pac. 523; *Darlington's Estate*, 147 Pa. St. 624, 30 Am. St. Rep. 776, 23 Atl. 1046; *United States v. Coffin*, 83 Fed. 337; *Isham v. Parker*, 3 Wash. 755, 29 Pac. 835; *Wallace v. Town*, 8 Wash. 244, 35 Pac. 1080. A transaction between attorney and client, which is obviously fair and just, or which is proved to be so, will be upheld: *Morrison v. Smith*, 130 Ill. 304, 23 N. E. 241; *Cousins v. Partridge*, 79 Cal. 224, 21 Pac. 745; *Wise v. Hardin*, 5 S. C. 325; *Dockery v. McLellan*, 93 Wis. 381, 67 N. W. 733; *Baker v. First Nat. Bank*, 77 Iowa, 615, 42 N. W. 452.

Thus, a lawyer's purchase from his client of property obtained by the litigation will be upheld where the consideration was adequate and the attorney acted fairly, openly, and in good faith: *Mitchell v. Colby*, 95 Iowa, 202, 63 N. W. 769; *Roman v. Mali*, 42 Md. 513; *Yeamans v. James*, 27 Kan. 195; *Laccede Bank v. Keeler*, 109 Ill. 385; *Rochester v. Levering*, 104 Ind. 562, 4 N. E. 203; *Ah Foe v. Bennett*, 35 Or. 231, 58 Pac. 508; *Edwards v. Meyrick*, 2 Hare, 68. An attorney will not, however, be permitted to purchase the subject matter of the litigation, to the client's disadvantage, especially during the pendency of the confidential relation: *Miles v. Ervin*, 1 McCord Eq. 524, 16 Am. Dec. 623; *Cunningham v. Jones*, 37 Kan. 477, 1 Am. St. Rep. 257, 15 Pac. 572; *Brigham v. Newton*, 49 La. Ann. 1539, 22 South. 777; and to sustain the transaction, when questioned, it devolves upon the attorney to show its perfect fairness and equity and that there was an adequate consideration: *Dunn v. Record*, 63 Me. 17; *Roman v. Mali*, 42 Md. 513; *Burnham v. Heselton*, 82 Me. 495, 20 Atl. 80; *Miles v. Ervin*, 1 McCord Eq. 524, 16 Am. Dec. 623; *Yeamans v. James*, 27 Kan. 195; *Carter v. West*, 93 Ky. 211, 19 S. W. 592; otherwise the transaction cannot be upheld: *Howell v. Ransom*, 11 Paige, 538; *Wilson v. Cantrell*, 40 S. C. 114, 18 S. E. 517; *Rogers v. R. E. Lee Min. Co.*, 9 Fed. 721. All dealings between attorney and client for the benefit of the former are not only regarded with jealousy and closely scrutinized, but they are presumptively invalid, on the ground of constructive fraud, and the burden is upon the attorney to overcome such presumption: *Thomas v. Turner*, 87 Va. 1, 12 S. E. 149, 668; *Burnham v. Heselton*, 82 Me. 495, 20 Atl. 80; *Elmore v. Johnson*, 143 Ill. 513, 36 Am. St. Rep. 401, 32 N. E. 413. In West Virginia, an attorney's purchase of a claim from his client, during the existence of the confidential relation, is voidable by the client, though the attorney may have given an adequate price for it, and gained no advantage whatever: *Lane v. Black*, 21 W. Va. 617. The plaintiff's attorney, in an action pending on appeal, cannot purchase his client's

claim: *Copley v. Lambeth*, 1 La. Ann. 316; and, of course, an attorney is forbidden to purchase an interest in the thing in controversy adverse to his client. Such a purchase is void: *Cunningham v. Jones*, 37 Kan. 477, 1 Am. St. Rep. 257, 15 Pac. 572; or at least voidable: *Sutherland v. Reeve*, 151 Ill. 384, 38 N. E. 130.

An attorney cannot take advantage of his client's inclination to waste his estate, to prevent his heirs from receiving it, and if the client conveys it to his attorney, the deed will be set aside unless the attorney establishes fairness, adequacy of consideration, and equity in the conveyance. He cannot hold it for an adequate consideration: *Ross v. Payson*, 160 Ill. 349, 43 N. E. 399. A client who seeks to set aside a conveyance made to his attorney during the confidential relation is not required to show fraud or imposition; and upon the attorney's failure to sustain the burden of proving fairness, adequacy of consideration, and equity, the transaction will be regarded by a court of equity as constructively fraudulent: *Willin v. Burdette*, 172 Ill. 117, 49 N. E. 1000; *Lewis v. J. A.*, 4 Edw. Ch. 599; *Condit v. Blackwell*, 22 N. J. Eq. 481; *Howell v. Baker*, 4 Johns. Ch. 118; *McCormick v. Malin*, 5 Blackf. 509, 523; *Thomas v. Turner*, 87 Va. 1, 12 S. E. 149, 668; *Burnham v. Heselton*, 82 Me. 495, 20 Atl. 80; *Howell v. Ransom*, 11 Paige, 538. But, if an attorney has purchased from his client after the confidential relation has ended, the client cannot avoid the contract without showing that it was procured by actual fraud: *Tancre v. Reynolds*, 35 Minn. 476, 29 N. W. 171.

OVERSHINER v. STATE.

[156 Ind. 187, 59 N. E. 468.]

STATUTES—UPHOLDING CONSTITUTIONALITY OF.—Legislative acts are presumed to be valid, and they are to be upheld by the courts, not only when clearly authorized, but in all cases of doubt, and until it is made clearly to appear that they contravene some constitutional provision.

STATUTES—ASSAILING CONSTITUTIONALITY OF—PRACTICE.—One who assails a legislative act as unconstitutional must be able to point out the particular provision of the constitution which has been violated, and the ground upon which it has been unequivocally infringed.

CONSTITUTIONAL LAW—POWER TO APPOINT OFFICERS.—The exclusive right to exercise the power of appointment to office does not rest in the executive department of the government. State officers, or officers performing state functions, may be chosen, under legislative authority, by private corporations.

CONSTITUTIONAL LAW—POWER OF STATE DENTAL ASSOCIATION TO APPOINT EXAMINERS.—A statute regulating the practice of dentistry, which provides for the appointment of a state board of five dental examiners, one by the governor, one by

the state board of health, and three by the state dental association, is not unconstitutional because of the provision which confers power upon the association to appoint three of the members.

J. A. Kersey and A. E. Steele, for the appellant.

W. L. Taylor, attorney general, Merrill Moores, and C. C. Hadley, for the state.

187 HADLEY, J. Appellant was convicted of practicing dentistry without a license, or certificate of registration, in violation of the provisions of the act of 1899 approved March 6, 1899: Acts 1899, p. 479. The section involved is in these words:

"Sec. 2. A board of examiners consisting of five reputable practicing dentists shall be appointed on or before the last Tuesday of June, 1899, and biennially thereafter, one by the governor, one by the state board of health, and three by the Indiana state dental association, said board to serve for the term of two years from the date of such appointment. When convened said board shall examine all applications, issue certificates thereon, and also may examine all applicants for certificates of qualification and issue such certificates to all such applicants as shall pass a satisfactory examination."

Appellant assails the judgment upon the ground that the statute upon which it rests is violative of section 1, article 3, section 1, article 5, section 18, article 5, and section 3, article 6, of the state constitution and the fourteenth amendment of the federal constitution. Appellant **188** admits that he practiced dentistry without the license required by the statute under which he is prosecuted, and that the judgment is right if that statute is constitutional.

A statute upon the same subject and in all material respects the same as the one before us (Acts 1887, sec. 2, p. 58; Burns' Rev. Stats. 1894, sec. 5596) was held to be constitutional in *Wilkins v. State*, 113 Ind. 514, 16 N. E. 192. In that case the point was made against the act that the authority to appoint three members of the board of examiners was an enlargement of the corporate powers of the state dental association, by special law, in contravention of the constitution. Again the same statute was held to be in harmony with section 23, article 1, of the constitution forbidding the granting of privileges which shall not upon the same terms equally belong to all citizens: *Ferner v. State*, 151 Ind. 247, 51 N. E. 360. It is here asserted that the statute is bad for being in conflict with

the various provisions of the constitution above set out, the contention being that the appointment by the state dental association of three members of the board of examiners was void for want of authority in the legislature to confer the power of appointment upon a private corporation or individual outside the executive department.

The power of the general assembly to enact laws is subject to no restrictions save those imposed by the state and federal constitutions: *Hovey v. State*, 119 Ind. 395, 21 N. E. 21; *Lowe v. Board etc.*, 156 Ind. 163, 59 N. E. 466. Its laws are presumed to be valid, and they are to be upheld by the courts, not only when clearly authorized, but in all cases of doubt, and until it is made clearly to appear that they contravene some constitutional provision. Courts will not, therefore, search the constitution for express sanction, nor for reasonable implications, to sustain a legislative enactment, but the successful assailant must be able to point out the particular provision that has been violated and the ground upon which it has been unequivocally infringed: *Robinson v. Schenck*, 102 Ind. 307, 319, 1 N. E. 698; *Hedderick v. State*, 101 Ind. 564, 51 Am. Rep. 768, 1 N. E. 47; *French v. State*, 141 Ind. 618, 639, 41 N. E. 2.

189 We concede in fullest terms appellant's contention that our state government is composed of three distinct and co-ordinate branches, namely, the legislative, executive (including the administrative), and judicial, and that the powers committed by the people to one branch cannot be exercised by those performing duties in another without express authority to do so, or the exercise of such power becomes essential or appropriate to the effective discharge of the duties imposed upon such branch. And while it has been many times decided by this and other courts that, as a general rule, the power of appointment to office is an appropriate executive prerogative, yet, as said by Mitchell, J., in *Hovey v. State*, 119 Ind. 401, 21 N. E. 21: "It is a fundamental error, however, to assume that the exclusive right to exercise the power of appointment is included in the general grant of power to the executive." In the distribution of governmental power the people had the undoubted right to lodge any part of it where it pleased them, and when expressly placed the court will suffer no encroachment upon it by those acting in another department; but where the constitution is silent and the question is one of public policy, or relates to the best means or agency for the attain-

ment of some governmental end, it must be presumed that the framers of the constitution intended to invest the legislative body with a large discretion in the selection of the agencies most suitable and beneficial to the public.

In *People v. Hurlburt*, 24 Mich. 44, 93, 9 Am. Rep. 103, Cooley, J., says: "The legislature, in prescribing new rules, have necessarily a large discretion as to whether the agencies for putting them in force shall be named by themselves, or left to the selection of the executive."

That eminent expounder of constitutional law, Chief Justice Marshall, in *McCulloch v. Maryland*, 4 Wheat. 316, on page 421, says, with respect to the federal constitution: "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. ¹⁹⁰ But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." Relating to the same subject the celebrated author and jurist already quoted cites approvingly: "Where the constitution contains no negative words to limit the legislative authority in this regard, the legislature in enacting a law must decide for itself what are the suitable, convenient, or necessary agencies for its execution": Cooley's *Constitutional Limitations*, 6th ed., 134, note.

The constitution is silent upon the subject of general appointments to office. It is provided by section 1, article 5, that "the executive powers of the state shall be vested in a governor" and by section 18, article 5, "when, at any time, a vacancy shall have occurred in any other state office [except appointment vested in the general assembly], or in the office of judge of any court, the governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified," and by section 1, article 15, that: "All officers whose appointments are not otherwise provided for in this constitution shall be chosen in such manner as now is, or hereafter may be, prescribed by law."

Three things are clearly apparent from these provisions: 1. The power of appointment to some offices is committed to the general assembly; 2. The power to make temporary appointments to fill vacancies in any state office, or in the office of judge, until such officer can be regularly chosen ¹⁹¹ as provided by law, and thus to avoid a suspension of the functions of such office, is conferred upon the governor; and 3. All other officers whose appointments are not specially provided for in the constitution shall be chosen in such manner as the legislature may deem expedient. It cannot be contended that the appointment to the office of state dental examiner is fixed by the constitution, for no such office was in existence when the constitution was adopted. The appointments to that office, therefore, come within the purview of section 1, article 15, and shall be made in such manner as may be hereafter prescribed by law. The manner prescribed by law is that the state board of dental examiners shall consist of five members, one to be appointed by the governor, one by the board of health, and three by the state dental association.

It is claimed that the statute must fail for the reason that the legislature has no constitutional warrant for bestowing its police power upon a private corporation to be by it exercised upon the citizens of the state. We perceive no reason why a corporation, such as the one complained of, may not prove itself a repository of power, as safe and salutary as an individual. The corporation is composed of practicing dentists, organized for the promotion of scientific knowledge and skill in the practice of the profession of dentistry, and which association thus stands in an intimate and well-informed relation to the subject, and possessed of a peculiar interest in the successful administration of the law. It is difficult to conceive of an appointing power with higher qualifications, or likely to be swayed by more laudable motives, and that it is an organization of persons mutually interested in the enforcement and proper administration of the law surely furnishes no reason for its condemnation.

Chief Justice Marshall, in *McCulloch v. Maryland*, 4 Wheat. 316, further adds: "That a corporation must be considered as a means not less usual, not of higher dignity, not ¹⁹² more requiring a particular specification than other means, has been sufficiently proved. . . . We find no reason to suppose that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested

in government, ought to have specified this. . . . But being considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it."

In the case known as the Slaughter-House Cases, 16 Wall. 36, the legislature of Louisiana had granted a corporation the exclusive right for twenty-five years to maintain slaughter-houses, landings for cattle, and cattle-yards, within certain parishes of the state, including the city of New Orleans, requiring all animals offered for sale or slaughtered to be brought to the yards of the corporation, authorizing the corporation to charge fees, and prohibiting all other persons from maintaining such places within said territory. In holding that the legislature had constitutional authority within its police powers to confer these public duties upon the corporation, the court, by Justice Miller, uses this language: "It cannot be denied that the statute under consideration is aptly framed to remove from the more densely populated part of the city the noxious slaughter-houses, and large and offensive collections of animals necessarily incident to the slaughtering business of a large city, and to locate them where the convenience, health, and comfort of the people require they shall be located. And it must be conceded that the means adopted by the act for this purpose are appropriate, are stringent, and effectual. But it is said that in creating a corporation for this purpose, and conferring upon it exclusive privileges—privileges which it is said constitute a monopoly—the legislature has exceeded its power. If this statute had imposed on the city of New Orleans precisely the same duties, accompanied by the same privileges, which it has on the corporation which it created ¹⁰³ it is believed that no question would have been raised as to its constitutionality. In that case the effect on the butchers in pursuit of their occupation and on the public would have been the same as it is now. Why cannot the legislature confer the same powers on another corporation, created for a lawful and useful public object, that it can on the municipal corporation already existing? That wherever a legislature has the right to accomplish a certain result, and that result is best attained by means of a corporation, it has the right to create such a corporation, and to endow it with the powers necessary to effect the desired and lawful purpose, seems hardly to admit of debate": See, also, *Louisville Gas Co. v. Citizens' Gas Co.*, 115

U. S. 683, 6 Sup. Ct. Rep. 265; Commonwealth v. Vrooman, 164 Pa. St. 306, 44 Am. St. Rep. 603, 30 Atl. 217.

For many years state officers, or officers performing state functions, have been chosen by private corporations under legislative authority without question. Some of these are, three members of the board of trustees of Purdue University, two by the state board of agriculture, and one by the state board of horticulture (Acts 1875, p. 120; Burns' Rev. Stats. 1894, sec. 6176); grain inspector by the board of trade or other commercial bodies of the county (Acts 1875, p. 172; Burns' Rev. Stats. 1894, sec. 8718); sextons of churches, and officers of fairs, who ex officio are made by law peace officers (Acts 1881, p. 174; Burns' Rev. Stats. 1894, sec. 2074); the state chemist by Purdue University Board (Acts 1881, p. 511; Burns' Rev. Stats. 1894, sec. 6618); the state livestock sanitary commission by the state board of agriculture (Acts 1889, p. 380; Burns' Rev. Stats. 1894, sec. 2871); the superintendents of schools of three of the largest cities of the state, with the governor and presidents of the higher state schools, shall constitute the state board of education with power to grant state certificates of qualification to teachers: Acts 1875, p. 130; Burns' Rev. Stats. 1894, sec. 5849.

We hold, therefore, that the general assembly in conferring ¹⁹⁴ upon the state dental association power to appoint three members of the state board of dental examiners did not transcend its constitutional power, and that appointments to said board of examiners by said association are valid. Judgment affirmed.

THE APPOINTMENT OF PUBLIC OFFICERS by designated associations, corporations, or persons may be authorized by the legislature: See the monographic note to *People v. Freeman*, 13 Am. St. Rep. 130; *Fox v. McDonald*, 101 Ala. 51, 46 Am. St. Rep. 98, 13 South. 416. But see *State v. Hocker*, 39 Fla. 477, 63 Am. St. Rep. 174, 22 South. 721.

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HATFIELD v. DE LONG.

[156 Ind. 207, 59 N. E. 483.]

RELIGIOUS SOCIETIES—SPIRITUAL OFFENSES—JURISDICTION.—A SECULAR COURT will not assume jurisdiction over spiritual offenses. As to them, the decision of the spiritual court is final and will be accepted as conclusive by the secular court, except where there has been a usurpation of power.

RELIGIOUS SOCIETIES—EXPULSION FOR SPIRITUAL OFFENSE—INJUNCTION.—An appellate tribunal of a religious society, which tribunal is not organized in conformity with the laws of the church, may be enjoined from expelling a member of the church on the charge of a spiritual offense.

J. T. Alexander, M. L. Spencer, and W. A. Branyan, for the appellant.

J. Q. Cline, J. C. Branyan, J. B. Kenner, and U. S. Lesh, for the appellees.

207 BAKER, J. A demurrer for want of facts was sustained to appellant's complaint. On his refusal to plead further, the judgment was entered from which this appeal was taken. The material facts alleged are these: Appellant is, and has been for twenty years, a member of a religious organization, whose highest governing body, according to the organic law of the society, is the general conference that meets each quadrennium; whose next highest governing body is the annual conference of subdivisions of the church; whose next highest governing body is the quarterly conference of subdivisions of the annual conference; and whose lowest governing body is the local congregation. Appellant was a member of the local congregation at Huntington, Indiana. One of the appellees was the pastor, one the presiding elder, and certain others were members of the same congregation. Appellant had a large acquaintance and high standing throughout the membership of the society, and was elected a lay delegate from his annual conference to the general conference of 1893, at which he was chosen chairman of the lay delegates. The election of delegates to the general conference of 1897 was held in November, 1896. Appellant **208** was again a candidate for election as a lay delegate by his annual conference. His pastor was opposed to his candidacy, and gave out in speeches that appellant should not sit, if elected, because charges would be preferred against him and he would be expelled from the church before the gen-

eral conference would meet. Appellant was elected by the highest vote given any candidate. As soon as the result was known, the pastor caused appellant to be summoned for trial. The trial resulted in a judgment of expulsion. (The complaint sets forth a number of alleged irregularities in the proceedings, which it is unnecessary to notice here for reasons subsequently stated.) From this judgment appellant took an appeal to the next quarterly conference. The organic law of the society authorizes an appeal to the quarterly conference, but no higher. It is provided that on appeal the trial shall be had before a tribunal of five, two to be chosen by the accused, two by the quarterly conference, and the fifth by the four; that no person shall sit as a member of the appellate tribunal who sat in judgment at the original trial; that a decision of a majority of the appellate tribunal shall be final; and that any member who refuses to abide by such decision shall be expelled without further trial. Appellees constitute the quarterly conference. Appellant chose two competent persons to act as members of the appellate tribunal. Appellees, with the fraudulent purpose of depriving appellant of the benefits of his appeal, selected two of their number to act as members of the appellate tribunal who had sat in judgment at the original trial. These two refuse to consider the selection of anyone as the fifth member of the appellate tribunal except a certain person who is in the conspiracy to deprive appellant of the benefits of an appeal and whose purpose is to join the other two in denying appellant a fair hearing. The office of lay delegate is one of trust and profit, to which a compensation of fifty dollars is attached. Appellant has done nothing for which he may properly be disciplined or expelled. ²⁰⁹ The quarterly conference has no judicial functions in connection with appeals. Its only duty is to select two eligible members of the appellate tribunal. There were and are many competent persons to choose from, but appellees persist in upholding the unlawful selections already made. The prayer is that the two ineligible persons be enjoined from sitting on the appellate tribunal, and that all the appellees be enjoined from acting in the premises until two competent persons have been selected by the quarterly conference.

It is immaterial what irregularities were committed at the original trial, for, if secular courts will intervene at all, they will not do so until the complaining party has exhausted his remedies within the church: *German etc. Church v. Commonwealth*, 3 Pa. St. 282.

If property rights are involved in the decision of an ecclesiastical judicatory, the secular courts may generally be called upon to determine the controversy: *Gaff v. Greer*, 88 Ind. 122, 45 Am. Rep. 449; *Smith v. Pedigo*, 145 Ind. 361, 33 N. E. 777, 44 N. E. 363. But no property rights are directly involved in this appeal.

If civil rights, as contradistinguished from ecclesiastical questions are passed upon by a church tribunal, the secular courts will, as a general rule, decide the merits of the case for themselves. For example, if a pastor's salary is stopped, not as an incident or indirect result of his expulsion from the church, but by a direct breach of a contract lawfully entered into, a civil right is involved which a secular court may intervene to protect: *Jennings v. Scarborough*, 56 N. J. L. 401, 28 Atl. 559; *O'Hara v. Stack*, 90 Pa. St. 477; *Wallace v. Trustees*, 194 Pa. St. 178, 45 Atl. 84. But in the present case no civil rights are directly affected. If appellant loses the office of lay delegate to the general conference and the pecuniary emoluments thereto attached, he will lose them as an incident or indirect result of his ²¹⁰ excision from the body of the society, and not by the breach of a civil contract. The allegations of the complaint with respect to the office and compensation of delegate will therefore be disregarded.

If only ecclesiastical questions, such as those of doctrine and discipline, are in issue, the decision of the spiritual court is final and will be accepted as conclusive by the secular courts: *Grimes v. Harmon*, 35 Ind. 198, 254, 9 Am. Rep. 690; *White Lick Quarterly Meeting etc. v. White Lick Quarterly Meeting etc.*, 89 Ind. 136; *O'Donovan v. Chatard*, 97 Ind. 421, 49 Am. Rep. 462; *Shannon v. Frost*, 42 Ky. 253; *Fitzgerald v. Robinson*, 112 Mass. 371; *German etc. Church v. Commonwealth*, 3 Pa. St. 282; *Travers v. Abbey*, 104 Tenn. 665, 58 S. W. 247. The allegations of the complaint that appellant has not offended against the faith and teachings of the church present, therefore, a question that is not cognizable here.

The foregoing considerations, however, do not dispose of this appeal. The cases that have been spoken of presuppose the existence of an ecclesiastical judicatory in accordance with the organic law of the church. The member, by joining, agrees that the church shall be the exclusive judge of his right to continue. For the purpose of trying a member on charges of having violated the rules of the church or the laws of God, the church is the tribunal created by the organic law. The member has con-

sented that, for all spiritual offenses, he will abide the judgment of the highest tribunal organized under the constitution of the church. But he has not consented to submit to usurpation. As Mr. Justice McCabe said in *Smith v. Pedigo*, 145 Ind. 361, 407, 44 N. E. 368: "It must be the act of the church, and not the act of persons who are not the church." In this case, it is disclosed that appellant has proceeded as far as he can within the church. He was compelled either to submit his appeal to a tribunal organized in defiance of the constitution of the church, or to appeal to the secular courts. If the secular courts are without jurisdiction to grant relief, it is apparent that, on ²¹¹ the facts alleged in the complaint, the question of appellant's guilt or innocence of spiritual offense will be determined by an unconstitutional tribunal. This court will have nothing to do with the charge of spiritual offense. That is an ecclesiastical question purely. But the inquiry whether or not the tribunal has been organized in conformity with the constitution of the church is not ecclesiastical. It is the same question, and that only, that may arise with respect to any voluntary association, such as fraternal orders and social clubs. The assertion of jurisdiction in such a case is not an interference with the control of the society over its own members; but, on the contrary, it assumes that the constitution was intended to be mutually binding upon all, and it protects the society in fact by recalling it to a recognition of its own organic law: *Bouldin v. Alexander*, 15 Wall. 131, 139, 140; opinion of Lawrence, C. J., and Sheldon, J., in *Chase v. Cheney*, 58 Ill. 509, 541, 11 Am. Rep. 95; *Schweiker v. Husser*, 146 Ill. 399, 435, 436, 34 N. E. 1022; *Fitzgerald v. Robinson*, 112 Mass. 371, 379; *Jones v. State*, 28 Neb. 495, 44 N. W. 658; *Pounder v. Ashe*, 36 Neb. 564, 54 N. W. 847; *Walker v. Wainright*, 16 Barb. 486; *Loubat v. Le Roy*, 40 Hun, 546; *Heaton v. Hull*, 59 N. Y. Supp. 281; 28 Misc. Rep. 97; *Brown v. Cure etc. de Montreal*, L. R. 6 P. C. 157; *McMillan v. Free Church*, 23 Ct. Sess. Cas. 1314, 1334; note to *Hiss v. Bartlett*, 63 Am. Dec. 772, 776; note to *Kearns v. Howley*, 68 Am. St. Rep. 856; *Nance v. Busby*, 91 Tenn. 303, 18 S. W. 874, 15 L. R. Ann. 801, note.

It is suggested that appellant might not be convicted by the tribunal complained of, and that therefore he is not entitled to the injunction prayed for. If a conviction by that tribunal would be illegal, so also would be an acquittal. The decision, right or wrong, of a proper tribunal would not be reviewed by the secular courts; but they will determine whether or not an

alleged tribunal has been constitutionally organized; and the proper time to do ²¹²so, on an application for injunction, is before it takes action. As an unlawful expulsion would affect appellant's standing in his community and accomplish an injury for which there is no adequate remedy at law, injunction is the proper remedy.

Judgment reversed, with directions to overrule the demurrer to the complaint.

RELIGIOUS SOCIETIES.—WHILE COURTS OF EQUITY have no jurisdiction of purely ecclesiastical questions, yet they will take hold of cases involving the civil or property rights of members of religious societies and determine such rights, notwithstanding the final decision of the ecclesiastical tribunals: See the monographic note to *Kearns v. Howley*, 68 Am. St. Rep. 864-869, on the jurisdiction of equity over voluntary unincorporated associations.

HURLEY v. EDDINGFIELD.

[156 Ind. 416, 59 N. E. 1058.]

PHYSICIANS AND SURGEONS—STATUTE REGULATING THE PRACTICE OF MEDICINE—CONSTRUCTION OF.—A statute regulating the practice of medicine, which provides for a board of examiners, standards of qualification, examinations, licenses to those qualified, and penalties for practicing without a license, is a preventive, not a compulsive, measure. The licensee is not bound to practice on any other terms than such as he may choose to accept.

NEGLIGENCE CAUSING DEATH—REFUSAL TO RENDER MEDICAL ASSISTANCE—ACTION FOR DAMAGES.—A licensed physician is not bound to enter into a contract of employment to render professional service to everyone who applies, and is not, therefore, answerable in damages for the death of a person, caused by refusal to render medical assistance.

G. D. Hurley, H. D. Van Cleave, and D. Kennedy, for the appellant.

M. E. Clodfelter, H. N. Fine, and E. M. Spruham, for the appellee.

⁴¹⁶BAKER, J. Appellant sued appellee for ten thousand dollars damages for wrongfully causing the death of his intestate. The court sustained appellee's demurrer to the complaint, and this ruling is assigned as error.

The material facts alleged may be summarized thus: At and for years before decedent's death appellee was a practicing physi-

cian at Mace, in Montgomery county, duly licensed under the laws of the state. He held himself out to the public as a general practitioner of medicine. He had been decedent's family physician. Decedent became dangerously ill and sent for appellee. The messenger informed appellee of decedent's violent sickness, tendered him his fees for his services, and stated to him that no other physician was procurable in time and that decedent relied on him for attention. No other physician was procurable in time to be of any use, and decedent did rely on appellee for medical assistance. Without any reason whatever, appellee refused to render aid to decedent. No other patients were requiring appellee's immediate service, and he could have gone to the relief of decedent if he had been willing to do so, ⁴¹⁷ Death ensued, without decedent's fault, and wholly from appellee's wrongful act.

The alleged wrongful act was appellee's refusal to enter into a contract of employment. Counsel do not contend that, before the enactment of the law regulating the practice of medicine, physicians were bound to render professional service to everyone who applied: Wharton on Negligence, sec. 731. The act regulating the practice of medicine provides for a board of examiners, standards of qualification, examinations, licenses to those found qualified, and penalties for practicing without license: Acts 1897, p. 255; Acts 1899, p. 247. The act is a preventive, not a compulsive, measure. In obtaining the state's license (permission) to practice medicine, the state does not require and the licensee does not engage, that he will practice at all or on other terms than he may choose to accept. Counsel's analogies, drawn from the obligations to the public on the part of innkeepers, common carriers, and the like, are beside the mark.

Judgment affirmed.

A PHYSICIAN MAY NOT REFUSE to attend a patient, it seems, after taking charge of him: See the monographic note to Howard v. Grover, 48 Am. Dec. 481.

SOUTH BEND v. TURNER.

[156 Ind. 418, 60 N. E. 271.]

APPEAL—JOINT EXCEPTION TO SEPARATE RULINGS—FUTILITY OF.—If a joint demurrer of two defendants, and a separate demurrer of one of them, are overruled, and a joint exception is taken to both rulings, no assignment of error can be predicated thereon by one of the exceptors.

APPEAL—WHAT MAY BE FIRST RAISED ON, BY AN INDEPENDENT ASSIGNMENT OF ERRORS.—The total absence from the complaint of any averment essential to the cause of action, or the presence of some averment which destroys it, are objections which may be raised for the first time on appeal by an independent assignment of errors.

APPEAL—OBJECTIONS TO COMPLAINT—WHAT DEEMED TO HAVE BEEN WAIVED.—Mere uncertainty, or inadequacy of averment in a complaint, such as might have been amended and cured upon motion seasonably made, is deemed, on appeal, to have been waived by a defendant who proceeded with the trial to final judgment without objection.

APPEAL—ASSIGNMENT OF ERROR—FAILURE OF.—An assignment of error which challenges a complaint as a whole must fail where any paragraph of the pleading is sufficient.

MUNICIPAL CORPORATIONS—DANGEROUS SEWER—PERSONAL INJURY—LIABILITY FOR LICENSEE'S NEGLIGENCE.—Although a company, in the construction of a sewer for a city, leaves the street so obstructed as to be inconsistent with public use, this does not exempt the city from liability for an injury to a person who falls into an uncovered manhole in the sewer, if it is shown that it had notice, or might have had by the exercise of proper oversight, that its licensee had acted in a negligent manner and left its streets in an unsafe and dangerous condition.

APPEAL—ANSWERS TO INTERROGATORIES—JUDGMENT ON—GENERAL RULE.—All reasonable presumptions must be indulged against the special answers and in support of the general verdict, and if the general verdict, thus aided, is not in irreconcilable conflict with the answers, it must stand.

NEGLIGENCE—ANSWERS TO INTERROGATORIES—MOTION FOR JUDGMENT UPON—WHEN PROPERLY OVERRULED.—In an action by a child, six and a half years of age, against a city and a construction company, for personal injuries sustained by the plaintiff in falling into an uncovered manhole in a sewer constructed by the company for the city, a motion by the city for judgment on answers to interrogatories, on the ground that such answers show that the plaintiff was guilty of contributory negligence, is properly overruled, where it is shown that the plaintiff was playing on a sand pile in the street near the manhole; that the hole had been left continuously, for two weeks, uncovered, with the knowledge of defendants; that children were attracted to the place for the purpose of play; and that the plaintiff, at the time of the accident, did not have intelligence enough to know the danger of the open manhole.

TRIAL—PERSONAL EXAMINATION OF PLAINTIFF—POWER OF COURT TO ORDER—ACTION FOR PERSONAL INJURY.—A court has power, in an action for a personal injury, upon

a proper application of the defendant, before entering upon the trial, to order a physical examination of the plaintiff's person for the purpose of determining the nature and extent of the injuries complained of, whenever the ends of justice appear to require it, if such examination may be made without danger to the plaintiff's life or health, or the infliction of serious pain.

APPEAL—REVIEW OF COURT'S DISCRETION IN REFUSING A PHYSICAL EXAMINATION OF THE PLAINTIFF'S PERSON.—When the circumstances appearing in the record in an action for a personal injury present a reasonably clear case, justifying a physical examination of the plaintiff's person, the refusal of the defendant's motion, properly made before the trial, for such an examination, is such an abuse of discretion as authorizes the reversal of a judgment for the plaintiff.

O. M. Cunningham, T. E. Howard, and J. G. Orr, for the appellants.

F. J. L. Meyer and C. P. Drummond, for the appellee.

419 HADLEY, J. Suit by appellee to recover damages for personal injuries. The facts set forth in the complaint are substantially as follows: On the eighth day of April, 1894, the appellants, being, respectively, a municipal and private corporation, were engaged in the construction of a trunk sewer for the defendant city through one of its public streets, declining northward and terminating in St. Joseph river; that at a point near its terminus the appellants constructed a manhole, circular in form, and two and one-half feet in diameter, near the center of a public street crossing, thus constituting a means of communication with said sewer from the surface of the street to the bottom of said sewer, a distance of twenty-nine feet; that said manhole was carelessly and negligently permitted by the appellants to be open and uncovered on said day, and was and had been carelessly and negligently permitted by the defendants to be and remain open and uncovered continuously prior thereto **420** for many days and weeks, without any signal or warning of any kind, and without any protection to persons lawfully upon the street; that said sewer from its mouth, or terminus, to the manhole, and for some distance beyond, had been in part completed, and large piles of sand had been piled upon the street where the sewer was completed near the manhole by the defendants, and had been by them carelessly and negligently permitted to remain there, and were calculated to, and did, attract children for the purpose of engaging in play in the sand; that the children of the neighborhood were accustomed, with the knowledge of the defendants, to play in the street with said sand piles; that the plaintiff on said day, being six and a

half years of age, was so engaged at play with the said sand piles, and at the time did not know of the open condition of the manhole, and while so engaged in play, and while in the exercise of due care and caution, did, by reason of the negligence of the defendants as aforesaid, fall into said open manhole, and was precipitated to the bottom of the sewer, without fault, and without any warning by the defendants of the danger existing by reason of the open manhole, and whereby he was greatly injured.

The complaint is in four paragraphs. The first was withdrawn. The second and third are in substance the same. The fourth charges that the manhole at the time of the accident was, and had been for many days and weeks, negligently suffered by the defendants to be and remain insufficiently covered, etc. The joint demurrer of the defendants and the separate demurrer of the defendant city to each paragraph of the complaint were overruled, and a joint exception to both rulings reserved. Upon issues joined, the jury returned a general verdict for appellee and answers to divers interrogatories. The city alone appeals, and assigns for error: 1. The insufficiency of the facts stated to constitute a cause of action against it; 2. The action of the court in overruling its demurrer to each paragraph of the ⁴²¹ complaint; 3. In overruling its separate motion for judgment in its favor on the answers to interrogatories; and 4. In the overruling of its separate motion for a new trial.

No question upon the complaint is properly presented by the demurrers. The record shows that "the defendants demur to each paragraph of the complaint," etc. Then follow three separate papers, being the separate demurrers of the defendant city to each the second, third, and fourth paragraphs of the complaint, and the record then proceeds: "Which demurrers the court overruled, to which ruling of the court defendants except." Exceptions taken thus in gross reserve no question, and an assignment of error predicated thereon by one of the exceptors is futile: *Johnson v. McCulloch*, 89 Ind. 270, 273; *Western Union Tel. Co. v. Trissal*, 98 Ind. 566, 570; *Walter v. Walter*, 117 Ind. 247, 249, 20 N. E. 148; *Elliott's Appellate Procedure*, sec. 788.

Appellant, however, makes an independent assignment of error that the complaint does not state facts sufficient to constitute a cause of action against it. The total absence from the complaint of any averment of some fact or facts essential

to the existence of the cause of action, or the presence of some averment that absolutely destroys the plaintiff's right of recovery, may be for the first time raised in this court by an independent assignment of errors under section 346 of the code (Burns' Rev. Stats. 1894, sec. 346; Rev. Stats. 1881, and Horner's Rev. Stats. 1897, sec. 343), but mere uncertainty, or inadequacy of averment, such as might have been amended and cured upon motion seasonably made, will be deemed to have been waived by a defendant who proceeds with the trial to final judgment without objection, and who brings his complaint for the first time, after the cause of action has been strengthened by the verdict of a jury, and the presumptions indulged in favor of the decisions of the trial court upon motions for judgment, and for a new trial: *Shoemaker v. Williamson*, 156 Ind. 384, 59 N. E. 1051, and authorities cited; *Kinney v. Dodge*, 101 Ind. 573; *Smith v. Smith*, 106 Ind. 43, 45, 5 N. E. 411. This assignment of error ⁴²²² challenges the complaint as an entirety, and if any paragraph thereof is sufficient, the assignment must fail: *Buchanan v. Lee*, 69 Ind. 117; *Caress v. Foster*, 62 Ind. 145; *Miller v. Billingsly*, 41 Ind. 489, 492.

The complaint avers that the defendants were constructing the sewer; that they had constructed the manhole; that the defendants negligently permitted the manhole to be and remain open and uncovered on the day of the plaintiff's injury, and so to be and remain open and uncovered continuously for several weeks prior thereto, and negligently permitted a large sand pile, which defendants had produced, to be and remain on said day and for several weeks prior thereto near the manhole, and at a point on said sewer where the same was completed, with the knowledge that the children in the neighborhood, including the plaintiff, were accustomed to play in said sand piles. There is no suggestion in the complaint that the defendant construction company was an independent contractor, nor that it had the exclusive possession of the street; nor does it appear from anything averred, except for the presence of the sand piles, that the public was prevented or in any way denied the usual right of play or travel in the street. Even assuming, as appellee argues, that the facts pleaded show that the street was so obstructed by the construction of the sewer as to be inconsistent with public use, and that the construction company was necessarily in the exclusive possession of the street the city would not thereby be relieved of liability when it is shown

that it had notice, or might have had notice by the exercise of proper oversight, that its licensee had acted in a negligent manner and left its streets in an unsafe and dangerous condition: *Stalder v. Huntington*, 153 Ind. 354, 55 N. E. 88; *Senhenn v. Evansville*, 140 Ind. 675, 40 N. E. 69; *Indianapolis v. Doherty*, 71 Ind. 5; *Elliott on Roads and Streets*, 2d ed., sec. 634. We are unable to see why the complaint is not sufficient against the city if tested by demurrer, and it is clearly so when questioned for the first time in this court.

423 With respect to the motion for judgment on the answers to interrogatories, notwithstanding the general verdict, the rule is that all reasonable presumptions must be indulged against the special answers and in support of the general verdict, and if the general verdict, thus aided, is not in irreconcilable conflict with the answers, it must stand: *Louisville etc. R. Co. v. Creek*, 130 Ind. 139, 142, 29 N. E. 481; *British-American etc. Co. v. Wilson*, 132 Ind. 278, 283, 31 N. E. 938; *Louisville etc. R. Co. v. Schmidt*, 134 Ind. 16, 33 N. E. 774; *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 53 N. E. 235. The reason of the rule is that the jury is required to pronounce upon all the issuable facts proved in the case, while the court in testing the force of isolated facts disclosed by answers to interrogatories does not know, and cannot know, what other facts touching the same matters were rightfully before the jury to justify their verdict. Therefore, in conceding to the jury the presumption of right judgment, to overthrow its general verdict, the special facts returned must be of such a nature as to exclude the possible existence of other controlling facts, provable under the issues, relating to the same subject. The answers show that the construction company had exclusive possession of the street at the manhole for the purpose of building the sewer; that said company frequently warned boys away from playing in the sand pile near the open manhole; that the plaintiff knew that the manhole was uncovered, and that he was six and a half years of age, and from the answers it is contended that it affirmatively appears that the plaintiff was guilty of contributory negligence, and the city free from liability. If there were no other answers supportive of the general verdict, we could not approve the contention. We could not assume that a boy six and a half years of age was so advanced in knowledge as to be able to know when he was in a place where he ought not to be, and to appreciate the evidences and presence of danger: *Cleveland etc. Ry. Co. v. Klee*,

154 Ind. 430, 56 N. E. 234; nor would the isolated fact that the construction company had the exclusive ⁴²⁴ possession of the street for the purpose of building the sewer prevail, as a defense for the city, against the presumptions that would arise under the averments of the complaint that both the construction company and city carelessly permitted the manhole to remain open and uncovered near a sand pile that they knew was attractive to children, and to which they knew children were attracted for play continuously for many weeks. But by other answers it is found that the plaintiff, at the time of the accident, did not have intelligence enough to know the danger of the open manhole, nor was it shown that he was ever warned of the danger by anyone. It is further shown that the manhole had been completed for four weeks; that it was within four feet of a sand pile seven feet high, and had been left continuously for two weeks uncovered, with the knowledge of both the city and the construction company, and with their further knowledge that the sand was attractive to the children of the neighborhood, and that they were attracted to it for the purpose of play; that there were no guards or barricades about the manhole, nor on the street or sidewalks, and the street from the manhole to the mouth of the sewer was for two weeks prior to the accident traveled by hundreds of people; that the sewer was completed from its mouth to the manhole, and for three hundred feet beyond, at the time of the accident, except the leveling of the street grade. The motion for judgment upon the answers to interrogatories was properly overruled.

The first ground urged for a new trial is the refusal of the court, upon appellants' motion, to order a physical examination of the plaintiff. Before the commencement of the trial appellant filed and presented its verified motion that the court select some competent, responsible, and unbiased physician and surgeon of the county to examine the head, leg, and eye of the plaintiff before the beginning of the trial, for the purpose of discovering and giving testimony as to the true character and extent of his injuries, and their probable effect as to permanency upon his mind and person; ⁴²⁵ that the plaintiff is a child nine years of age, and was but seven years of age when he received the alleged injuries, and the defendant has had no opportunity and has been wholly unable to inform itself upon the subject of said injuries; that the plaintiff asserts in his complaint that his skull was cracked, his eyes injured, his leg broken, his nervous system impaired, and that his said injuries

are great and permanent; that the plaintiff will produce as a witness in his own behalf the physician who attended him in his illness, and the defendant is totally unable to produce any witness who has examined the plaintiff and who can state from medical knowledge the nature and extent of his injuries, and the probability or improbability of their permanency; that the plaintiff's father be permitted to be present at such examination; that such examination will be able to determine the true nature and extent and probable effect of such injuries, and may be made without pain, humiliation, or danger to the plaintiff.

The overruling of this motion presents a question of some difficulty, and upon which the courts of the country are not entirely agreed. It is one, too, that has but recently engaged the attention of the courts of last resort. The fundamental principle, however, is an ancient doctrine of the common law, limited, it is true, to a few classes of cases, among them mayhem and divorce cases, wherein impotency was charged; but as the sources of evidence have been extended to parties and in many other ways, its application has been expanded to meet new conditions. The doctrine rests upon the principle that justice is the object of judicial investigation, and that courts charged with its administration, as a necessary means of attaining that end, have inherent power to require the production of the most infallible evidence. That its application to personal injury cases is a modern practice does not disprove its common-law origin. As was well said by Justice Brewer in his dissenting opinion in *Union etc. Co. v. Botsford*, 141 U. S. 250, 258, 11 Sup. Ct. Rep. 1000, 1003: ⁴²⁸ "The silence of common-law authorities upon the question in cases of this kind proves little or nothing. The number of actions to recover damages, in early days, was, compared with later times, limited; and very few of those difficult questions as to the nature and extent of the injuries which now form an important part of such litigation were then presented to the courts. If an examination was asked, doubtless it was conceded without objection, as one of those matters the right to which was beyond dispute. Certainly, the power of the courts and of the common-law courts to compel a personal examination was, in many cases, often exercised and unchallenged. Indeed, wherever the interests of justice seemed to require such an examination, it was ordered." Beginning with the case of *Loyd v. Hannibal etc. R. R. Co.*, 53 Mo. 509, decided in 1873, there have followed

many adjudications upon the power of the trial court to order a physical examination of the plaintiff in suits for personal injuries upon request of the defendant. In this first case the power, upon slight consideration, was denied. In 1877, in the well-considered case of *Schroeder v. Chicago etc. R. R. Co.*, 47 Iowa, 375, the power was affirmed. Following this lead, the states of Alabama, Arkansas, Georgia, Kansas, Kentucky, Michigan, Missouri, Minnesota, Nebraska, Pennsylvania, Ohio, Texas, and Wisconsin, have reasserted the rule as announced in the Iowa case: *Alabama etc. R. R. Co. v. Hill* (1885), 90 Ala. 71, 8 South. 90; *King v. State* (1895), 100 Ala. 85, 14 South. 878; *Sibley v. Smith* (1885), 46 Ark. 275, 55 Am. Rep. 584; *St. Louis etc. Ry. Co. v. Dobbins* (1893), 60 Ark. 481, 30 S. W. 887, 31 S. W. 147; *Richmond etc. R. R. Co. v. Childress* (1889), 82 Ga. 719, 14 Am. St. Rep. 189, 9 S. E. 602; *Hall v. Manson* (1896), 99 Iowa, 698, 68 N. W. 922; *Atchison etc. R. R. Co. v. Thul* (1883), 29 Kan. 466, 44 Am. Rep. 659; *Belt Electric etc. Co. v. Allen* (1898), 19 Ky. Law Rep. 1656, 44 S. W. 89; *Graves v. Battle Creek* (1893), 95 Mich. 266, 35 Am. St. Rep. 561, 54 N. W. 757; *Shepard v. Missouri etc. Ry. Co.* (1885), 85 Mo. 629, 55 Am. Rep. 390; ~~427~~ *Sidekum v. Wabash etc. Ry. Co.* (1887), 93 Mo. 400, 3 Am. St. Rep. 549, 4 S. W. 701; *Owens v. Kansas City etc. R. R. Co.* (1888), 95 Mo. 169, 6 Am. St. Rep. 39, 8 S. W. 350; *Hatfield v. St. Paul etc. R. R. Co.* (1885), 33 Minn. 130, 53 Am. Rep. 14, 22 N. W. 176; *Stuart v. Havens*, 17 Neb. 211 (1885), 22 N. W. 419; *Hess v. Lake Shore etc. R. Co.* (1890), 7 Pa. Co. Ct. 565; *Miami etc. Co. v. Bailey* (1881), 37 Ohio St. 104; *Chicago etc. Ry. Co. v. Langston* (1898), 19 Tex. Civ. App. 568, 47 S. W. 1027, 48 S. W. 610; *White v. Milwaukee etc. Ry. Co.* (1884), 61 Wis. 536, 50 Am. Rep. 154, 21 N. W. 524; *O'Brien v. La Crosse* (1898), 99 Wis. 421, 75 N. W. 81. These cases assert the doctrine that courts are instituted by the state to administer impartial justice to contending parties. In such contests it is the duty of the court to bestow upon the litigants equal and exact justice. This cannot be done without the court first obtaining the exact and full truth concerning the matters in controversy. Hence, from this duty of the court to dispense exact justice is essentially implied all power necessary to its performance, which includes the power to make subservient to its order all persons and things that will afford the most reliable evidence. In quasi recognition of this power it is the law of this state, and other states so far as we have

observed, that the court may permit the plaintiff in both civil and criminal cases to exhibit to the jury such weapons, implements, clothing, and wounds upon his person, or upon the person of the prosecuting witness, as are asserted to be the means, or effects, of the violence complained of: *Indiana Car Co. v. Parker*, 100 Ind. 181, 199; *Louisville etc. Ry. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; *Hess v. Lowrey*, 122 Ind. 225, 232, 17 Am. St. Rep. 355, 23 N. E. 156; *Citizens' St. Ry. Co. v. Willooby*, 134 Ind. 563, 33 N. E. 267; *Thrawley v. State*, 153 Ind. 375, 55 N. E. 95.

Such things, when a part of the *res gestae*, serve a most useful purpose in assisting the jury to a proper application of the testimony. They are unerring exponents of the truth of the particular fact, and it may not be controverted that when the nature, extent, and effect of a palpable injury is ⁴²⁸ in dispute—not involving scientific questions—the jury may arrive at a more accurate knowledge of the truth by the aid of their own senses than by a verbal description of the observations of others. This being well known to a plaintiff, he is certain to avail himself of this advantage in the trial when the truth will be beneficial to him, and if impartial justice is to be administered, we see no way of its attainment in all cases if an important source of evidence is open to one and closed to the other. That the question embraces the exercise of scientific knowledge makes no difference. Physicians and surgeons, however honest and learned, are fallible, and equally, with other honest and honorable persons, subject to the unconscious influence of friendship and personal interest—the latter, in surgery cases, involving not only professional reputation, but pecuniary liability. Besides, surgeons of equal learning and honesty may not diagnose an injury in the same way. They may not be equally strong in perception, or equally accurate in observation, or in measurements, and thus form different judgments of the existing conditions, which of necessity must constitute the basis of their scientific opinions, and it may be readily seen that if a defendant must make his defense against the expert opinions of the plaintiff's chosen surgeons, without an opportunity of testing the verity of the basis for such opinions, he may be placed at disastrous disadvantage such as the law cannot and does not sanction.

The cases above cited as affirming the existence of the power establish the following propositions: 1. That trial courts have the power to order the medical examination by experts

of the injured parts of a plaintiff who is seeking to recover damages therefor; 2. That a defendant has no absolute right to demand the enforcement of such an order, but the motion therefor is addressed to the sound discretion of the trial court; 3. That the exercise of such discretion is reviewable on appeal, and correctible in cases of abuse; 4. That the examination should be applied for and ⁴²⁹ made before entering upon the trial, and should be ordered and conducted under the direction of the court, whenever it fairly appears that the ends of justice require a more certain ascertainment of important facts which can only be disclosed, or fully elucidated, by such an examination, and such an examination may be made without danger to the plaintiff's life or health, or the infliction of serious pain; 5. That the refusal of the motion, when the circumstances appearing in the record present a reasonably clear case for the examination under the rules stated is such an abuse of discretion in the trial court as will operate to reverse a judgment for the plaintiff; 6. That such an order may be enforced, not by punishment as for a contempt, but by delaying or dismissing the proceeding.

The discretion lodged in the trial court, as fairly deducible from the decisions, is a sound discretion based solely upon legal considerations. When serious and permanent injuries are claimed by the plaintiff, and he, or she, has submitted to examination by a chosen physician, or surgeon, who appears as a witness in plaintiff's behalf, and the nature, extent, and effect of the injury is to be deduced from objective conditions, and so fully from no other source, no degree of sentiment will justify a denial of the motion. When it becomes a question of probable violence to the refined and delicate feelings of the plaintiff on the one hand, and probable injustice to the defendant on the other, the law will not hesitate—the court in making such orders, with respect to time, place, and persons, in every case, having such due regard for the feelings of the plaintiff and proprieties of the case as the ends of justice will permit.

So far as our researches have revealed, the federal supreme court, Justices Brewer and Brown dissenting, now stand alone in denial of the power: *Union etc. Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. Rep. 1000.

The decisions of New York were confused, and the rule both affirmed and denied in inferior courts, until established ⁴³⁰

by legislative enactment in 1893: Laws 1893, c. 721; Code Civ. Proc., sec. 873.

The power was first denied in the state of Missouri in Loyd's case, *supra*, in 1873, but affirmed by the same court in Shepard's case, *supra*, in 1885, and affirmance has been adhered to in many subsequent cases.

In Illinois the supreme court, in 1882, in *Parker v. Enslow*, 102 Ill. 272, 40 Am. Rep. 588, disposed of the question in a single line as follows: "The court had no power to make or enforce such an order"; and in subsequent decisions, while not expressly overruling the *Parker* case, recognize the existence of the power, when properly and timely invoked: See *Chicago etc. R. R. Co. v. Holland* (1887), 122 Ill. 461, 13 N. E. 145; *St. Louis Bridge Co. v. Miller* (1891), 138 Ill. 465, 28 N. E. 1091.

The decisions in Indiana, in the words of the majority opinion of the federal supreme court in the *Botsford* case, *supra*, "are conflicting and indecisive." In the first appearance of the question before this court in any form, in 1885, in *Louisville etc. Ry. Co. v. Falvey*, 104 Ind. 409, 416, 417, 3 N. E. 389, 4 N. E. 908, in ruling upon the competency of evidence touching the details of a physical examination of the plaintiff under an order of court, made upon the defendant's motion, the right of the trial court to make the order is not questioned.

Kern v. Bridwell, 119 Ind. 226, 12 Am. St. Rep. 409, 21 N. E. 664, was an action for slander for charging the plaintiff with lewdness. The court refused to order the plaintiff to submit her person to examination by medical experts. The question related to a collateral matter and not to the subject matter of the suit—to a source of evidence not shown to be reliable nor useful to the defendant in his answer of justification, and should not be accepted as an authority in a suit by a plaintiff to recover damages for a particular injury to his person.

The question came before the court in *Hess v. Lowrey*, 122 Ind. 225, 17 Am. St. Rep. 355, 23 N. E. 156, and the request for an examination denied because ⁴³¹ untimely made. The court, by Mitchell, J., said: "It is undoubtedly true that the court may in its discretion in a proper case, if application is seasonably made, require the plaintiff to submit his person to a reasonable examination by competent physicians and surgeons when necessary to ascertain the nature, extent and permanency of injuries."

The case of *Terre Haute etc. R. R. Co. v. Brunner*, 128 Ind. 542, 26 N. E. 178, presenting a like question was ruled by *Hess v. Lowrey*, 122 Ind. 225, 17 Am. St. Rep. 355, 23 N. E. 156.

In *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, 409, 28 N. E. 860, the question we have here came before the court for decision, and it was there held that the power of the court to order an examination did not exist, the court regarding what was said in *Hess v. Lowrey*, 122 Ind. 225, 17 Am. St. Rep. 355, 23 N. E. 156, as obiter. Upon further, and perhaps fuller, consideration of the question, we are satisfied that the decision in the *Newmeyer* case upon this point is refuted by the great weight of authority, and it is therefore disapproved. It is insisted that the question should be ruled by the decision of the federal supreme court, but adopting as our own the language used by *Montgomery, J.*, in *Graves v. Battle Creek*, 95 Mich. 266, 35 Am. St. Rep. 561, 54 N. W. 757, with respect to the *Botsford* decision: "This decision is entitled to very great weight; but in view of the manifest justice of a requirement that the plaintiff in case of personal injury shall produce the best evidence attainable, we think this case should not be permitted to stem the otherwise almost unbroken current of authority upon the subject."

In the case at bar the motion of the defendant was timely; the injuries were alleged to be serious and permanent, as affecting both the body and mind of the plaintiff; the plaintiff would produce in his own behalf his attending physician; the defendant had no opportunity to inspect the injuries, or in any way inform itself as to their nature, extent, and effect, and was wholly unable to contest, if it should be contested, the testimony of the plaintiff's expert witness; that an examination by skilled and unbiased surgeons would ⁴³² enable them to determine the nature and extent of the injuries, and, at least in a degree, to determine their effect and permanency, and could be made without danger or pain to the plaintiff. The application was made before the trial began, more than two years after the infliction of the injuries, and clearly presents a case where the trial court should have exercised its discretion in favor of the motion. For error of the court in overruling the motion, the appeal must be sustained. Judgment reversed, with instructions to grant appellant's motion for a new trial.

PHYSICAL EXAMINATION OF PARTY.—In an action for personal injuries, where the plaintiff tenders an issue as to his physical condition, the court has power to order him to submit to an ex-

amination of his person: *Wanek v. Winona*, 78 Minn. 98, 79 Am. St. Rep. 354, 80 N. W. 851. See a discussion of this subject in the monographic note to *Cleveland etc. Ry. Co. v. Huddleston*, 68 Am. St. Rep. 242-252; and the recent case of *Belt Electric Line Co. v. Allen*, 102 Ky. 551, 80 Am. St. Rep. 374, 44 S. W. 89.

INDEPENDENT CONTRACTOR.—THE LIABILITY OF CITIES for the acts and negligence of independent contractors is discussed in the monographic note to *Covington etc. Bridge Co. v. Steinbrock*, 76 Am. St. Rep. 417-422.

BOGUE v. BENNETT.

[156 Ind. 478, 60 N. E. 143.]

MUNICIPAL CORPORATIONS—RUNNING OF TRACTION-ENGINE—VOID ORDINANCE.—A city has no power to prohibit traction-engines, or other vehicles not propelled by animal power, from being run upon its streets and alleys. An ordinance containing such a prohibition is not a reasonable exercise of the city's grant of power over its streets and alleys, and is void.

O. L. Cline, J. C. Blacklidge, C. C. Shirley, and C. Wolf, for the appellants.

L. J. Kirkpatrick, J. F. Morrison, and T. C. McReynolds, for the appellee.

⁴⁷⁸ **MONKS**, J. Appellee, Claude Bennett, was injured in 1898, while riding a bicycle on a public street in the city of Kokomo, by colliding with a traction-engine owned by appellant Gwinn, and operated by his employé, Bogue. The complaint is in four paragraphs. The first, second, and fourth paragraphs are predicated upon the alleged negligence of appellants and the want of contributory negligence on the part of the injured party. The second paragraph charges a willful injury. It is alleged in said first paragraph that said traction-engine was run on said street of said city without right, and without having any person in advance of said engine, not less than fifty yards, to warn all persons approaching said engine, who might be in charge of horses, of the proximity of said engine, and in violation of city ordinance 383 of the city of Kokomo, which prohibited the running of traction-engines and other vehicles propelled by steam on and over the streets and alleys of said city. The ⁴⁷⁹ third paragraph contains substantially the same allegations concerning the violation of section 2014 of Burns' Revised Statutes of 1894 (Acts

1889, p. 428), and the violation of said city ordinance. The trial of the cause resulted in a verdict and judgment against appellants. The errors assigned and not waived by failure to argue the same call in question the action of the court in overruling appellants' motion for a new trial.

It is first insisted by appellants that the court erred in admitting in evidence ordinance No. 383 of the city of Kokomo, which prohibits the running of traction-engines or other vehicles propelled by steam on the streets and alleys of said city, for the reason that the city council had no power to enact said ordinance, and therefore the same was invalid. Appellee insists that this question cannot be considered, for the reason that the bill of exceptions containing the evidence and the objection of appellants to the introduction of said ordinance in evidence and the ruling of the court thereon is not properly in the record. The question of the validity of said ordinance is presented by instruction 9 given by the court to the jury, over the objections of appellants, which is also assigned as a cause for a new trial. We need not, therefore, decide whether or not said bill of exceptions is in the record. The record shows that the bill of exceptions containing the instructions was properly filed May 29, 1899. The motion for a new trial was overruled April 7, 1899, and ninety days' time given appellants within which to file bills of exceptions. Said bill of exceptions is copied into the transcript, and contains the statement, over the signature of the trial judge, that it was tendered to, and signed by, him on April 7, 1899. This shows that the bill of exceptions containing the instructions was filed within the time given by the court, and that it was signed by the trial judge before it was filed. This fully complies with all the statutory requirements: Burns' Rev. Stats. 1894, secs. 638, 641; Rev. Stats. 1881, and Horner's Rev. Stats. 1897, secs. 626, 629; Robinson v. Dickey, 143 Ind. 205, 210, 42 N. E. 679; Ayers v. Armstrong, 142 Ind. 263, 41 N. E. 522.

⁴⁸⁰ Said instruction 9 reads as follows: "If you find from the evidence that at the time of the injury complained of there was a city ordinance in full force and effect in the city of Kokomo, which provided that the running of traction-engines and other similar vehicles propelled by steam over and upon the streets and alleys of such city was prohibited, and fixed a penalty for the violation thereof; and if you further find that the defendant Bogue, in violation of such ordinance, was running a traction-engine propelled by steam over and upon a public

street in such city at the time of the alleged injury, and that the defendant Bogue was at such time in the service and employment of the defendant Gwinn, and acting within the line and scope of such duty and employment, as charged in the complaint, then the court instructs you that the running of such engine, in violation of said ordinance would be an unlawful act, and would constitute negligence per se on the part of the defendant; and if you further find from the evidence that such negligence—that is, the propulsion of said traction-engine upon and along such street by steam, instead of horse or other power permitted by said ordinance—was the proximate cause of the injury to plaintiff, without which the injury of which plaintiff complains would not have resulted; and further find that plaintiff was not guilty of negligence contributing to said injury, then it would be your duty to find for the plaintiff.” If the ordinance prohibiting the running of traction-engines or other vehicles propelled by steam on the streets and alleys of the city of Kokomo is invalid for the reason that the city had no power to pass the same, said instruction is clearly erroneous.

In this state municipal corporations possess and can exercise only such powers as are granted by the legislature in express words, and those necessarily or fairly implied or incident to the powers expressly granted and those essential to the declared purposes and objects of the corporation. No incidental powers can be implied except such as are ⁴⁸¹ essential to the accomplishment of the purposes of their creation and for their continued existence. Doubtful claims to power or any doubt or ambiguity in the terms used by the legislature are resolved against the corporation. It is also settled law that where the legislature in terms confers upon a municipal corporation the power to pass ordinances of a specified nature and character, and with precision defines the details of the same, and prescribes the penalties that may be imposed, if the power thus granted be not in conflict with the constitution, an ordinance within the powers granted, prescribing penalties within the designated limits, cannot be set aside by the courts even if they deem it unreasonable or against public policy. But where the power to legislate upon a given subject and the details of such legislation are not prescribed, then the ordinance passed pursuant thereto must be a reasonable exercise of the power, or it will be pronounced invalid. In other words, an ordinance expressly authorized by specific and definite legislative authority

will be upheld unless it conflicts with the constitution, while an ordinance which it is sought to uphold by virtue of the incidental powers of such municipal corporation, or under a general grant of authority, will be declared invalid, unless it be reasonable and fair, and not arbitrary and oppressive: *Pittsburgh etc. R. R. Co. v. Crown Point*, 146 Ind. 421, 45 N. E. 587, and cases cited.

It is contended by appellee that the power to pass said ordinance was granted by the following provisions of sections 3541 and 3623 of Burns' Revised Statutes of 1894. Section 3541 provides that the common council "shall have the additional powers herein permitted, and may make and publish by-laws and ordinances necessary to enforce the same. . . . Twelfth. To regulate the use of coaches, hacks, drays, and other vehicles for the transportation of passengers, freight, or other articles, to or from points within the city for hire or pay." Section 3623, *supra*, provides that "the common ⁴⁸² council shall have exclusive power over the streets, highways, alleys, and bridges within such city."

The provisions of the twelfth clause of section 3541, *supra*, give no authority to pass an ordinance prohibiting the running on the streets and alleys of said city of all vehicles propelled by steam. That clause only grants authority to regulate the vehicles described, when used for the purposes mentioned therein. There is no statute to which our attention has been called, and we know of none, which, in express words, confers upon the common council of cities the power to pass an ordinance prohibiting the running upon the streets and alleys of vehicles propelled by steam. It is not necessary, therefore, to decide as to the power of the legislature to grant such authority to municipal corporations.

Can the power to pass such an ordinance be fairly implied from those expressly granted, or is such power essential to the declared objects and purposes of the corporation, or can such ordinance be sustained under the general grant of authority over the "streets, highways, and alleys"? It is evident that the power to pass such ordinance was not essential to the accomplishment of the purposes for which such municipal corporations were created, nor for their continued existence. Said ordinance was not, therefore, authorized by any of the implied powers possessed by said city: *Pittsburgh etc. R. R. Co. v. Crown Point*, 146 Ind. 422, 45 N. E. 587.

Does the general grant of authority over the streets, highways, alleys, and bridges, given by section 3623, *supra*, authorize the enactment of such an ordinance? To be valid under such general grant of power, the ordinance must be a reasonable exercise thereof: *Pittsburgh etc. R. R. Co. v. Crown Point*, 146 Ind. 422, 45 N. E. 587. Highways and streets are not for the exclusive use of vehicles propelled by animal power, nor are travelers confined to the use of such power and ordinary carriages upon highways. The use of any new and improved means of locomotion must be deemed to have been contemplated ⁴⁸³ when the highways and streets were laid out or dedicated, whenever it is found that the general benefit requires it, and such new means of locomotion cannot be excluded therefrom merely because their use may tend to the inconvenience or even to the injury of those who continue to use the highways and streets by former methods. This was clearly recognized by the supreme court of Illinois in 1859 in the case of *Moses v. Pittsburgh etc. R. R. Co.*, 21 Ill. 515. The court said: "To say that a new mode of passage shall be banished from the streets, no matter how much the general good may require it, simply because streets were not so used in the days of Blackstone, would hardly comport with the advancement and enlightenment of the present age. Steam has but lately taken the place, to any extent, of animal power for land transportation, and for that reason alone shall it be expelled from the streets? For the same reason camels must be kept out, although they might be profitably introduced." In 1876, the same rule was declared in *Macomber v. Nichols*, 34 Mich. 212, 22 Am. Rep. 522, which was an action to recover for an injury occasioned by the plaintiff's horse being frightened by a traction-engine on the public highway. The court, by Cooley, J., said: "Persons making use of horses as the means of travel or traffic by the highways have no rights therein superior to those who make use of the ways in other modes. It is true that locomotion upon the public roads has hitherto been chiefly by means of horses and similar animals, but persons using them have no prescriptive rights, and are entitled only to the same reasonable use of the ways which they must accord to all others. Improved methods of locomotion are perfectly admissible, if any shall be discovered, and they cannot be excluded from the existing public roads, provided their use is consistent with the present methods.

"A highway is a public way for the use of the public in general, for passage and traffic without distinction: *Starr v. Chicago etc. R. R. Co.*, 24 N. J. L. 592. The restrictions ⁴⁸⁴ upon its use are only such as are calculated to secure to the general public the largest practicable benefit from the enjoyment of the easement, and the inconveniences must be submitted to when they are only such as are incident to a reasonable use under impartial regulations. When the highway is not restricted in its dedication to some particular mode of use, it is open to all suitable methods; and it cannot be assumed that these will be the same from age to age, or that new means of making the way useful must be excluded merely because their introduction may tend to the inconvenience or even to the injury of those who continue to use the road after the same manner as formerly. A highway established for the general benefit of passage and traffic must admit of new methods of use whenever it is found that the general benefit requires them; and if the law should preclude the adaptation of the use to the new methods, it would defeat, in greater or less degree, the purpose for which highways are established. . . . Horses may be, and often are, frightened by locomotives in both town and country, but it would be as reasonable to treat the horse as a public nuisance from his tendency to shy and be frightened by unaccustomed objects, as to regard the locomotive as a public nuisance from its tendency to frighten the horse. The use of the one may impose upon the manager of the other the obligation of additional care and vigilance beyond what would otherwise be essential. . . . If one in making use of his own means of locomotion is injured by the act or omission of the other, the question is not one of superior privilege, but it is a question whether, under all the circumstances, there is negligence imputable to some one, and if so, who should be accountable for it."

In *Wabash etc. Ry. Co. v. Farver*, 111 Ind. 195, 199, 60 Am. Rep. 696, 12 N. E. 296, decided in 1887 this court, by Mitchell, J., said: "Road engines propelled by steam, and portable engines operated by steam, have become familiar in every agricultural community. To declare that their use near, or their passage ⁴⁸⁵ over, a public highway constitutes a nuisance, would be practically to prohibit their use in the manner in which they are customarily employed and moved from place to place. It must be supposed that horses of ordinary gentleness have

become so familiar with these objects as to be safe, when under careful guidance: See, also, Cooley on Torts, 2d ed., 734-736. That highways and streets were not for the exclusive use of vehicles propelled by animal power, and that steam power might be used to propel vehicles thereon, was clearly recognized by the court in the case last cited, and by the legislature in the act of 1889 (Acts 1889, p. 428; Burns' Rev. Stats. 1894, secs. 2044-2046), regulating the manner of running traction or road engines on the public highways, streets, and alleys of incorporated towns and cities. Said act reads as follows:

"Sec. 1. Any person or owner of a traction or road engine shall, while using the said engine on any public highway, street, or alley of any incorporated town or city, send some person in advance of said engine, not less than fifty yards, to warn all persons approaching, who are in charge of a horse, team, or teams, of the proximity to such engine.

"Sec. 2. And it shall be the duty of the engineer in charge of said engine, or the owner thereof, upon the approach of said horse, team, or teams, to drive said engine to one side of the road or street when practicable, and to stop said engine until said horse, team, or teams have passed said engine, and the whistle of said engine shall not be sounded while said horse, team, or teams are passing.

"Sec. 3. Any person or persons violating any provisions of this act shall be deemed to be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than five dollars and not exceeding fifty dollars."

Incorporated cities and towns in this state have the power to regulate public travel upon the streets, so as to make them reasonably safe for those who go upon them on foot or in vehicles, and to enact ordinances for the protection of life, health, and property, and may have the power to prohibit the use of certain streets for certain purposes and by ⁴⁸⁶ certain classes of vehicles; yet it is evident that they have no authority, under their implied powers, or under the general grant of power over the streets and alleys, to prohibit traction-engines or other vehicles not propelled by animal power from using all the streets. Such an ordinance is not a reasonable exercise of such power over the streets. Appellee cites cases which hold that a municipal corporation has power to "prescribe the motive power to be used in moving street-cars in such corporations, and that when it prescribes

one kind of power the company cannot use another." This power results from the fact that a street railroad cannot be constructed on the streets of a town or city without the consent of the governing body thereof, which may in its discretion refuse such request, or grant it on such conditions as it deems proper, one of which may be that it shall only use a designated motive power: Elliott on Roads and Streets, 2d ed., secs. 736, 743. But vehicles, whether moved by animal, steam, or other power, which do not require a specially constructed track, may be run upon the streets and alleys of a municipal corporation, without first obtaining the consent of the governing body thereon: See Cooley on Torts, 2d ed., 734, 735. It is manifest, therefore, that the cases holding that municipal corporations may prescribe the motive power to be used in moving street-cars are not applicable here.

It is true, as insisted by appellee, that when the evidence is not in the record this court will not reverse, a judgment on an instruction given, unless it would not be correct under any evidence that could be given under the issues: *Wenning v. Teeple*, 144 Ind. 189, 194, 41 N. E. 600. From what we have already said, it is evident that said instruction would not have been correct under any evidence that might have been given under the issues. It follows that the court erred in overruling the motion for a new trial.

Judgment reversed, with instructions to sustain appellant's motion for a new trial, and for further proceedings not inconsistent with this opinion.

HIGHWAYS AND STREETS.—A STEAM-ENGINE as a means of locomotion in a highway is not necessarily a nuisance: *Macomber v. Nichols*, 34 Mich. 212, 22 Am. Rep. 522; *Commonwealth v. Allen*, 148 Pa. St. 358, 33 Am. St. Rep. 830, 23 Atl. 1115. See the first cited of these cases for a discussion of the right to use streets and highways for new modes of passage.

BARRETT v. MILLIKAN.

[156 Ind. 510, 60 N. E. 310.]

MECHANIC'S LIEN LAW—CONSTITUTIONALITY OF.—

A mechanic's lien law which gives to contractors, subcontractors, materialmen, and laborers a lien on buildings for which they have furnished material or performed labor, is not unconstitutional as depriving the land owner of property without due process of law, or as impairing the obligation of contracts, or as granting to one class of citizens privileges not granted upon the same terms to others.

W. R. Gardiner, C. E. Barrett, and E. A. Brown, for the appellants.

J. E. Kepperley, for the appellee.

511 DOWLING, C. J. This action was brought by the appellee, Millikan, against the appellants, Barrett and wife, to enforce a lien for materials furnished for, and used in the repair of, a dwelling-house erected on a lot owned by Barrett in the city of Indianapolis, Marion county, Indiana. The materials were sold by E. H. Eldridge & Co., an incorporated company, to one Roberts, who had the contract for making the repairs, and notice of the lien claimed was filed by that company. They afterward sold and assigned the claim and lien to the appellee. In addition to a general denial, Barrett and wife filed a special answer setting up, among other things, the fact that before the filing of the notice, and without any knowledge of the claim and lien of Eldridge & Co., or of the appellee, Barrett paid Roberts, the contractor, in full.

The errors assigned and discussed present the question of the constitutionality of the act generally known as the mechanics' lien law: Acts 1883, p. 140; Acts 1885, p. 95; Acts 1889, p. 257; Burns' Rev. Stats. 1894, secs. 7256-7279.

The validity of these acts, so far as they apply to the facts stated in the answer, is assailed on the following grounds: 1. The act seeks to deprive the owner of land of his property without due process of law, and denies him the equal protection of the laws as guaranteed by the constitution of the United States; 2. It attempts to create a lien upon real estate without notice to the owner, and without any contract between the person claiming the lien ⁵¹² and such owner, and

it impairs the obligation of contracts; 3. It interpolates into private contracts provisions for liens of third parties with whom the owner of the real estate has no contractual relation, and impairs the obligations of private contracts, and interferes with the rights of owners of real estate to make contracts relating to the improvement thereof; 4. It attempts to give one class of citizens rights not granted to all other citizens, and is therefore class legislation; 5. The act is not general in its operation, but is limited to a class of citizens of the state; 6. It purports to grant to one class of citizens engaged in mercantile and manufacturing pursuits privileges which do not belong to, and which are not granted to, all other citizens of the state engaged in like pursuits.

These six objections may fairly be reduced to three, viz.: 1. The act authorizes the appropriation of the property of the land owner without due process of law; 2. It impairs the obligation of contracts; 3. It grants to one class of citizens privileges not granted upon the same terms to others.

In discussing the case, counsel for appellants also contend that the statute violates the bill of rights, sections 1, 21, 22, article 1, because it is injurious to the well-being of the citizens of the state; because it demands the particular services of the land owner in protecting the interests of the subcontractor, or materialman, without compensation; and because it interferes with the freedom of the citizen to make contracts for the improvement of his property.

While the constitutionality of similar statutes has been denied in some courts of last resort, their validity has generally been recognized. The principal authorities on each side of the question are collected in the leading text-books and need not be mentioned here: Boisot on Mechanics' Liens, secs. 22-31; Jones on Liens, 2d ed., sec. 1184 et seq.

The principle upon which the claims of both contractors and subcontractors are usually held to rest was clearly stated by Shaw, C. J., in the early case of *Donahy v. Clapp*, 513 12 Cush. 440: "Before the statute of 1851, no one could create such a lien by a building contract, except the owner, or person having an interest therein, to the extent of such interest. But by that statute one who had contracted with the owner to erect a building had power, by his subcontract with another for the whole or part of the work, to create a similar lien on the estate in favor of such subcontractor. . . . Before that statute took effect as law, the contract gave a lien to Hilt

[the original contractor] only, which was the act of the owner charging his own estate. But under the operation of that statute, a precisely similar contract by the owner of the land would give the subcontractor a power to bind the estate by other liens in favor of subcontractors for labor thereon. Such liens, in favor of such subcontractors, would equally bind the estate by consent of the owner; because such a contract, by force of the existing law when it was made, of which the owner is presumed to be conusant, gives his irrevocable power to his contractor to charge and bind his estate; and when such power is executed by the actual making of such subcontract for labor, it is in law the act of the owner, hypothecating his own estate to the extent of the price of such labor": Phillips on Mechanics' Liens, secs. 65, 79; Laird v. Moonan, 32 Minn. 358, 20 N. W. 354; O'Neil v. St. Olaf's School, 26 Minn. 329, 4 N. W. 47; White v. Miller, 18 Pa. St. 52; Deardorff v. Everhartt, 74 Mo. 37; Spofford v. True, 33 Me. 283, 291, 54 Am. Dec. 621; Jones on Liens, secs. 1304, 1306.

The judgment in Jones v. Great Southern etc. Co., 79 Fed. 477, referred to in appellants' brief, was overruled by the circuit court of appeals (86 Fed. 370), Lurton, J., Taft, J., and Clark, D. J., sitting. The opinion of the court was delivered by Lurton, J., who fully reviewed the Ohio statutes on the subject of mechanics' liens, and said: "The validity of such statutes need not be rested upon mere authority. ⁵¹⁴ They find sanction in the dictates of natural justice, and most often administer an equity which has recognition under every system of law. That principle is that everyone who, by his labor or materials, has contributed to the preservation or enhancement of the property of another, thereby acquires a right to compensation. . . . The legal effect of the contract is to give a lien to all who, at the instance of his contractor, shall be employed to furnish labor or materials for the work which he has let out. So far as such a statute is limited to future contracts, it cannot be said to impair the obligation of a contract. If the law be subject to no other objections, it impairs no contract, for all thereafter made are entered into upon the basis of the law. . . . Neither can the owner be said to be thereby deprived of his property without due process of law. He has voluntarily made a contract with the law before him. He has thereby subjected his property to liability for certain debts of the contractor. His own voluntary consent is an element in the transaction. He knows what the law is,

and makes a contract under that law. It is idle to say that under such circumstances he is deprived of his property without due process of law."

The material point decided in *Schroeder v. Galland*, 134 Pa. St. 277, 287, 19 Am. St. Rep. 691, 19 Atl. 632, also cited by appellants' counsel, was that the subcontractor was bound to know the precise nature and extent of the agreement of the contractor, and that he could not obtain a lien in contravention of a covenant in that agreement prohibiting all liens.

It has been held that a statute which allows subcontractors a lien, even though the owner has paid the contractor in full, is not unconstitutional on the ground that it unreasonably limits the owner's power to contract: *Laird v. Moonan*, 32 Minn. 358, 20 N. W. 354; *Atwood v. Williams*, 40 Me. 409; *Henry etc. Co. v. Evans*, 97 Mo. 47, 10 S. W. 868. And that such a statute does not impair the obligation ⁵¹⁵ of contracts: *Albright v. Smith*, 3 S. Dak. 631, 54 N. W. 816; *Spokane Mfg. etc. Co. v. McChesney*, 1 Wash. 609, 21 Pac. 198.

The question of the constitutionality of this act was thoroughly examined and emphatically decided by this court in *Smith v. Newbaur*, 144 Ind. 95, 42 N. E. 40, 1094. It was held in that case that the act was not objectionable on the ground that under it the owner might be deprived of his property without due process of law; that the owner contracts in contemplation of the statute, and that the statute does not restrict the ability of the owner to contract. These views, we think, are sound, and upon similar grounds statutes of the same kind have been sustained in most of the states of the Union.

The objections taken to the statute in the brief of counsel for appellants seem to rest upon supposed hardships and inconveniences which may result from it, rather than upon constitutional grounds. A very conclusive answer to these criticisms is furnished by the decision in *Colter v. Frese*, 45 Ind. 96, in which the court by Worden, J., say: "Many arguments have been pressed upon our consideration in respect to this point, as well as upon the question whether a lien can be acquired on account of work done for, or materials furnished to, a contractor, and not the owner. The most of them are based upon the real or supposed hardships of the law, as we construe it, in this, that in many cases it subjects the owner to the liability of making double payment for the same work or materials, and prevents him from making contracts for the erection of

buildings and the furnishing of materials therefor, to be paid for otherwise than in money, and other similar inconveniences. These arguments might have much force if addressed to the legislature, whose province is to make the law, but can have little weight against the clear and unequivocal terms of a statute, when addressed to a court, whose province is to determine what the law is, and not what it ought to be. . . . Its object is to secure to the mechanic, laborer, or materialman ⁵¹⁶ compensation for his work or materials. It prevents the owners of real estate from securing to themselves, without compensation, the benefits of the labor and materials of others, by means of low contracts with irresponsible or perhaps dishonest contractors. The inconveniences of the law do not seem to us to be insuperable. The owner may withhold from the contractor, for the period of sixty days after the completion of the work, enough to protect the property from liens for work or materials. If full payment is made at the end of that time, it is perhaps quite as prompt as payments are usually made."

The last objection to the statute, taken by the appellants, that the act favors a particular class of citizens to the exclusion of other citizens, is not sustained either by reason or authority. The classification is just, natural, and reasonable. It is open to all, and it applies equally to all the citizens of the state who bring themselves within the remedial scope of this act: *Gilson v. Board etc.*, 128 Ind. 65, 27 N. E. 235; *Consumers' Gas Trust Co. v. Harless*, 131 Ind. 446, 29 N. E. 1062; *Pennsylvania Co. v. State*, 142 Ind. 428, 41 N. E. 937.

In the case before us, we fail to perceive any real hardship. For all that appears in the answer, the appellant failed to exercise any diligence to discover whether any claims for materials remained unpaid before he paid the contractor in full, or to take any precautions to secure himself against imposition or loss. If he has sustained loss, that result cannot justly be charged upon the statute. We find no error. Judgment affirmed.

MECHANIC'S LIEN LAW—CONSTITUTIONALITY.—A statute giving a lien to laborers for services in converting standing trees into logs, masts, and lumber, does not conflict with the constitution, nor abridge the right to acquire, possess, and protect property: *Spofford v. True*, 33 Me. 283, 54 Am. Dec. 621. But it has been held that a mechanic's lien law enacted for the purpose of enabling strangers to the title to land to subject it to sale for obligations to which the owner never became bound, and in which he has no part, is unconstitutional: *Note to Santa Cruz etc. Co. v. Lyons*, 59 Am. St. Rep. 176.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

McDERMOTT v. AMERICAN BREWING COMPANY.

[105 La. 124, 29 South. 498.]

MASTER AND SERVANT—LIABILITY FOR UNAUTHORIZED ACT OF SERVANT.—If the driver of a delivery wagon, who, under agreement with his employer, when delivering goods to cash customers must collect the price of the goods delivered, or account for any resulting loss, delivers goods without collecting the price and afterward, in attempting to collect it or retake the goods, commits an assault and battery or other violence, he, and not the employer, is liable therefor.

MASTER AND SERVANT—LIABILITY FOR MALICIOUS ACT OF SERVANT.—If a servant goes outside of his employment without regard to his service, acting with malice, and wantonly causes damages to another, his master is not liable.

MASTER AND SERVANT—LIABILITY FOR ACTS OF SERVANT.—A servant has implied authority to do what is necessary to protect his master's property, or fulfill the duties intrusted to him; but if he steps aside from the scope of his employment, actuated by personal malice, or by motives of his own, he is, and the master is not, liable for the wrong committed.

D. M. and A. Scholars, for the appellant.

G. Lemle, for the appellee.

124 **BREAUX, J.** Plaintiff sues for damages arising from an assault made by one of defendant's employés, Moroy. He claims damages in the sum of ten thousand dollars. He avers, in substance, that this employé was defendant's driver and collector; that on a Monday he called at the store where plaintiff is employed as a clerk and salesman to collect the price of four kegs of beer which the defendant brewing company had sold to his employer the Saturday previous; that this employé was with another employé of the defendant company when he called

to collect, as just stated, and that he, plaintiff, said to this ¹²⁵ employé of the defendant that his (plaintiff's) employer, Cheevers, was not in and that he had no authority to pay the bill. Whereupon, this employé of the defendant grossly insulted plaintiff, charging him with falsehood; said that his employer, Cheevers, was not away, and began to search in the house for him; that, not finding him, he declared that if the bill was not paid immediately he would take the remaining keg of beer back into defendant's (the brewing company's) possession, and that Moroy became greatly angered when plaintiff placed himself in front of the beer cooler and objected to his removing the keg; that Moroy seized him by the throat and violently threw him on the floor. That owing to the plaintiff's inferiority in size and to his ill-health, Moroy inflicted, in a most cowardly manner, a number of violent blows with his hands and feet, causing severe injuries to his person; that while beating him, Moroy ordered the other employé of the defendant company, Gauthreaux by name, to take the keg and place it in the wagon, and that it was returned to defendant by this employé as he was directed.

Defendant interposed an exception of no cause of action to plaintiff's demand, and in the event of the court's overruling the exception, the defendant pleaded a general denial, and especially averred that it is not liable for the acts of its employés, if they acted as charged in plaintiff's petition.

The testimony shows that plaintiff was assaulted, as charged, and that the remaining keg of beer of the four delivered by the driver to the employer of the plaintiff was taken, as alleged, and placed in defendant's beer wagon. The responsibility, *vel non*, of the defendant for the act of its servant is the question for our decision.

The alleged offender was unquestionably in defendant's service. He drove its wagon and sold its beer, for which he received a salary of seventy-five dollars a month. The defendant had cash customers and credit customers. Before selling beer to a customer on credit he was required to obtain the consent of the company. It had collectors to collect amounts due for beer sold on credit. This driver was instructed to collect cash from the customers to whom the beer was sold for cash. He had to account for this cash in the morning after the previous day's sale. It appears that plaintiff's employer was a cash customer of the defendant from whom cash was required.

We think it had been usual with the driver to sell beer to plaintiff's ¹²⁶ employer on one day and return and collect the cash early the morning of the next day before settling with his (the driver's) employer. But whether this was usual or not, there can be no question but that on this occasion the driver delivered beer for an amount to be collected on the following business day. We are led to infer from the testimony that if delays were granted by the driver to the cash customers and a loss resulted, it was his loss. There was an agreement by which he was made to bear the loss—that is, it was deducted from his wages. The test of the liability is, In whose behalf was this employé acting, and was it with the intention of serving the purposes of the employer?

The act of this driver was not in the furtherance of the company's business nor in the protection of its interests. The defendant had not sent him to collect, nor was it interested in recovering losses by pursuing the violent methods which it pleased the driver to pursue. The instructions of the company were to collect the cash at the time of the sale and to hand it over to the proper party the next morning. In order, as he wrongfully imagined, to make return in the morning as instructed, he resorted to violence. He thereby sought to protect his own interest, for his employer, whether rightfully or wrongfully—a question with which we are not, at this time, concerned—had made provision to protect itself in case of the driver's failure to settle for the beer sold. The driver, by his own agreement with the company, and by his own inexcusable violence, had placed himself, at least, one remove from his employer and from the scope or even course of his employment. The act committed was not the act of the master and received no sanction from him in any way. When the servant returned to the plaintiff's employer's place of business, i. e., to Cheever's saloon, it was for the purpose, as we interpret the testimony, of collecting, in order to avoid paying the amount himself. He had disregarded the instructions by delivering to this customer the kegs of beer before payment of cash. It was not to subserve the master's interests, but his own.

It is true that this court recently held, in a case against a railroad company for damages for wrongful ejectment of a trespasser by its brakeman, that the brakeman had authority, as an incident to his position, to remove a trespasser. The trespasser was riding on an iron rod touching or near the brakes and the running gear of which, to some extent, at least, he impliedly

had charge. It was while in charge that the injury was inflicted and while seeking to protect the employer's property from the act of a trespasser. The running of the cars ¹²⁷ would, we readily assume, be interfered with if trespassers were allowed to steal rides in the presence of, and without objection from, those in charge. He was not in any manner acting for himself. The servant was acting in the general scope of his employment: *Dorsey v. Kansas City etc. Ry. Co.*, 104 La. 478, 29 South. 177. On the contrary, in the case before us for decision, the driver was seeking to collect an amount which, in accordance with agreement, he would have been charged with if he had failed to collect it.

In *Lafitte v. Railroad Co.*, 43 La. Ann. 37, 8 South. 701, the court said that a conductor in changing money for passengers acts at his own risk and responsibility; that the company (as in the case here) loses nothing if counterfeit money is accepted by the conductor as he is charged with it; consequently the false charge brought by the conductor that the passenger had sought to pass counterfeit money on him was not a charge for which the company could be held liable.

In *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 92, 8 Am. St. Rep. 512, 3 South. 635, the court held that the employer is not liable in damages for the outrage to which the passenger had been subjected by the servant, who was not acting within the scope of his employment; "that would be a dangerous ground for holding the employer responsible." Difficulties which might arise between the bank teller and the one who enters the bank for the purpose of collecting a check, the assault and battery committed by the clerk in a store, or the servant who answered the call for permission to see the master, are given as examples of acts for which the master could not be held liable.

Plaintiff cites the case of *Shea v. Reems*, 36 La. Ann. 966, in support of the position that the driver here was, as in that, acting within the scope of his employment. No question but that in all matters relating to the driving of defendant's wagon and in selling beer as instructed he was acting within the scope of his employment, but the servant here was not acting within the scope when he became a collector, resorting to an outrage on the plaintiff to compel him to deliver up the property in order that he might lessen his own personal liability to the defendant, his employer.

The doctrine of respondeat superior applies to acts of an agent within the scope of his employment. Was the act here within the scope of the servant's employment? We have seen that he did not follow his employer's instructions, and that, after having disregarded them, he sought to protect his own interests to the extent of committing an unlawful ¹²⁸ act. He did not commit this unlawful act under express or implied authority. Corporations are liable for the torts of their servants to the same extent as private individuals, but no further. If a servant goes outside of his employment without regard to his service, acting with malice, and wantonly causes damages to another, the master is not liable.

It is not contended that the defendant was sent for this beer. As we interpret the testimony, it made no difference to them whether or not he brought it back, as he was bound for it in case he did not return it, or he was bound to pay the price for which he was instructed to sell it. By the effect of the agreement between defendant and this servant, it had become the latter's business.

The unlawful assault was not in any manner necessary for the performance of the driver's work. A servant has implied authority to do what is necessary to protect his master's property or to fulfill the duties intrusted to him, but neither was sought to be done by this driver.

In another jurisdiction it has been decided that where a person employed to collect payments for machines sold on the installment plan is instructed, in case of refusal to pay, not to touch the machines, or take them back, the employer is not liable for an assault committed by the servant or agent in connection with an attempt, not authorized to seize the machine: *Feneran v. Singer Mfg. Co.*, 47 N. Y. Supp. 284; 20 App. Div. 574. Here there is analogy to the decision last cited in this: The kegs of beer had been delivered in accordance with the requirements of the defendant's business, but the cash had not been collected by the driver on delivery. The subsequent act was unauthorized and the master was no longer concerned, as the driver was bound for payment under the terms of his agreement.

We have reviewed all the decisions within our reach and have read several commentators upon the subject of the employer's liability, and have not found that the employer is to be held liable for acts of the employé not in line with his employment. If the servant steps aside from the scope of his own employment,

actuated by personal malice or from motives of his own, he is, and the master is not, liable for the wrong committed.

For the reasons assigned, the judgment appealed from is affirmed. Rehearing refused.

THE DOCTRINE OF RESPONDEAT SUPERIOR has no application when a servant actually wills or intends an injury, or steps aside from the purpose of the agency and inflicts an independent wrong: *Goodloe v. Memphis etc. R. R. Co.*, 107 Ala. 233, 54 Am. St. Rep. 67, 18 South. 166. If a servant steps aside from his master's business, for however short a time, to commit a wrong not connected with such business, the relation of master and servant is suspended, and the master is not answerable for the wrong: *Stephenson v. Southern Pac. Co.*, 93 Cal. 558, 27 Am. St. Rep. 223, 29 Pac. 234. But a master is liable for willful or malicious acts of his servant, done in the course of his employment and within the scope of his authority: *Nelson Business College Co. v. Lloyd*, 60 Ohio St. 448, 71 Am. St. Rep. 729, 54 N. E. 471; *Bryan v. Adler*, 97 Wis. 124, 65 Am. St. Rep. 99, 72 N. W. 368.

NEW ORLEANS AUXILIARY SANITARY ASSOCIATION IN LIQUIDATION.

[105 La. 172, 29 South. 337.]

EXECUTIONS—CORPORATE PROPERTY SUBJECT TO.—

The creditors of a private corporation, although established for a public purpose, are entitled to collect their claims out of the proceeds of the property of the corporation in liquidation.

MANDAMUS DOES NOT LIE to enforce the fulfillment of a mere contractual obligation.

S. L. Gilmore, city attorney, and A. McGuirk, assistant city attorney, for the appellant.

H. J. Loevy, for the appellee.

¹⁷⁷ MONROE, J. The counsel for the city argues that all of the property of the association, now before the court, having been bought and paid for by voluntary subscription of citizens, and having been acquired by a corporation established for a public purpose, must be held to be property dedicated to public use and not available to creditors of the association in satisfaction of the debts due them. He, therefore, contends that the judgment appealed from, in so far as it decrees that said property is subject to such debts, should be reversed.

The proposition stated ignores the fact that, whilst the purpose for which the association was established was public, the association itself was a private corporation, capable, in law, of owning property and incurring debts in its corporate capacity. If, in such a case, there is any law by which property so owned is exempt from seizure for debts so incurred, our attention has not been called to it. It may be that, by reason of the declared purposes for which the association was established, the residuum of its property, after the payment of its debts and of the expenses of administration, will vest in the public rather than in the corporators, but that is a matter which need not be determined until the debts and expenses are paid, and it is ascertained that such residuum exists. In the meanwhile, we are of opinion that, upon the case as presented, the recognition and appointment of the liquidating commissioners was authorized by law and precedent: *Stark v. Burke*, 5 La. Ann. 740; *Follett v. Field*, 30 La. Ann. 161; *In re Mechanics' Soc.*, 31 La. Ann. 627; *In re Louisiana Sav. Bank*, 35 La. Ann. 196; *State v. Herdic Coach Co.*, 35 La. Ann. 245; *Hancock v. Holbrook*, 40 La. Ann. 53, 3 South. 351; *In re Belton*, 47 La. Ann. 1614, 18 South. 642; *In re Moss Cigar Co., Ltd.*, 50 La. Ann. 789, 23 South. 544.

Considering the answer to the appeal and the prayer of the commissioners for amendment of judgment, it is well settled that a mandamus will not lie to enforce the fulfillment of a mere contractual obligation: *State v. New Orleans etc. R. R. Co.*, 37 La. Ann. 589; *State v. Kansas City etc. R. R. Co.*, 51 La. Ann. 200, 25 South. 126. If, ¹⁷⁸ however, the city continues to refuse to abide by the conditions of the ordinances referred to in the opinion, we know of no reason why the property of the association should not be sold at the instance of the commissioners for the purpose of the liquidation with which they are charged.

It is, therefore ordered, adjudged, and decreed that the judgment appealed from, in so far as it decrees that the "city of New Orleans, for the use and benefit of its citizens, be recognized as owner, and, as such, entitled to possession of the De Soto pump, the Thompson pump, the Morris baths, flushing pipes, and other machinery and improvements erected and placed by the New Orleans Auxiliary Sanitary Association upon the said city property," and in so far as it rejects the demand of the liquidating commissioners, appellees herein, for the sale of said property, be annulled, avoided, and reversed, and

it is now ordered, adjudged, and decreed that, unless the city of New Orleans shall, within thirty days from the date upon which this judgment shall become final, by pleading in the district court, consent to abide by all the conditions of the ordinances Nos. 6442 and 6981, administration series, with respect to the appointment of arbitrators, and the valuation and reversion of the property in controversy, then, and in that case, the said commissioners shall have leave to cause said property, or so much thereof as may be necessary for that purpose, to be sold in order to pay the debts due by the New Orleans Auxiliary Sanitary Association, and the legitimate charges and expenses incident to, and arising out of, the liquidation and administration of its affairs; such sale or sales to be made at public auction or otherwise, as may be ordered by the judge a quo upon the application of said commissioners. It is further ordered, adjudged, and decreed that the question of the ownership and destination of the residuum of property or money, if any there shall be, in the possession of said commissioners, after the payment of the debts, charges, and expenses above mentioned, is expressly reserved. It is further ordered, adjudged, and decreed that the judgment appealed from be, in all other respects, affirmed, and that the city of New Orleans pay the costs in both courts.

MANDAMUS DOES NOT LIE to compel the performance of private contracts: Florida etc. R. R. Co. v. State, 31 Fla. 482, 34 Am. St. Rep. 30, 13 South. 103; Miller v. State Board of Agriculture, 46 W. Va. 192, 76 Am. St. Rep. 811, 32 S. E. 1007.

NEW ORLEANS v. FABER.

[105 La. 208, 29 South. 507.]

CONSTITUTIONAL LAW—MUNICIPAL ORDINANCES REGULATING MARKETS.—A municipal ordinance prohibiting private markets within a certain distance from public markets is a valid exercise of the police power.

CONSTITUTIONAL LAW.—THE REGULATION AND CONTROL OF MARKETS, public and private, for the sale of provisions and commodities, including the places and distances from one another at which they may be kept, are matters of municipal police power, and may be intrusted by the legislature to a city council, to be exercised as, in its discretion, the public health and convenience may require.

CONSTITUTIONAL LAW—MUNICIPAL ORDINANCES REGULATING MARKETS.—The fact that a municipal ordinance

requires certain food commodities to be sold only in public markets, and that its effect is to compel dealers therein to go into the public markets or to go out of business, does not affect the validity of such ordinance nor render it unconstitutional and void.

CONSTITUTIONAL LAW—REGULATION OF MARKETS. A city may authorize persons to build markets and collect the revenues thereof for a fixed period in consideration of their conveying the property to the city at the end of the term, and the city may exact that such markets are to be under its control and in all respects governed by regulations applicable to other markets.

CONSTITUTIONAL LAW.—THE ESTABLISHMENT OF PUBLIC MARKETS and the prohibition of private markets are within the legislative discretion, which cannot be inquired into by the courts unless fraud is committed, or there is a manifest invasion of private right.

E. H. McCaleb, E. J. Meral, and E. H. McCaleb, Jr., for the appellant.

S. L. Gilmore, city attorney, and H. G. Dupre, assistant city attorney, for the appellee.

209 **MONROE, J.** Defendant, having been charged with the violation of city ordinance No. 312, new council series, undertook to defend himself by setting up the unconstitutionality of the ordinance, and of the law under the authority of which it was adopted; and, having been convicted and sentenced, has appealed directly to this court. The ordinance in question makes it unlawful for any person "to conduct a private market, or to sell at retail any fresh meat, fresh fish, game, poultry, or vegetables, except potatoes and onions, in any building, place, store, or stand, within three thousand two hundred feet, walking distance, from any public market, in the city of New Orleans"; prohibits the sale of oysters and groceries in the public markets, and contains some other provisions which need not be specially noticed. The act of the general assembly referred to (being Act No. 34 of 1900), authorizes the council of the city of New Orleans "to pass such ordinances for the government and regulation of private markets, in the city of New Orleans, as they, in their discretion, may deem proper," and to provide for the enforcement of the same, especially authorizing said council to "prescribe the manner in which such private markets shall be kept, and the distance at which they may be located from all public markets." There is no dispute as to the facts, and the questions of law which are presented are not unfamiliar to this court.

210 1. It is said that the defendant had complied with the pre-existing law (Act No. 116 of 1888 and ordinance No.

7607), and had established his business, in conformity thereto, within the populous district of the city; that he had thereby acquired rights which cannot be divested by subsequent legislation; and that, in so far as Act No. 34 of 1900 requires the removal of said business beyond said district, it is unconstitutional. Stated in other words, the proposition is, that because the defendant had established his business in conformity to the law and the ordinances in force prior to the adoption of Act No. 34 of 1900, he had thereby placed said business beyond the reach of the law-making power and had acquired a vested right to conduct the same business, in the same place, and in the same manner, forever. This proposition is untenable, and ignores the very premise upon which it rests. Thus, the defendant had established his business in conformity to Act 116 of 1888 and the city ordinance adopted under its authority. But that legislation was but the reassertion by the state and the city of the power to control, at discretion, the question of the location and regulation of private markets. In 1866 the general assembly, by Act No. 134 of the session of that year, had authorized the establishment of private markets everywhere, subject to the police ordinances of the city. In 1874, by Act No. 31, private markets were prohibited within twelve squares of the public markets. In 1878, by Act No. 100, they were prohibited "within a radius of six squares" of the public markets. But the use of the word "radius" gave rise to some trouble, as a question of construction, and, in 1888, Act. No. 116 was passed, prohibiting private markets "within a walking distance of six blocks from any public market; the said distance to be interpreted as meaning that represented by six blocks in a walk from the public market to a private market." When, therefore, the defendant established his market, agreeably to the provisions of this last-mentioned act, and of the ordinance adopted under its authority, he conformed to a law which changed the pre-existing regulations upon the subject, with presumed knowledge of that fact, and of the further fact that the authority to make and unmake such law had always been exercised by the state and city as part of the police power, and had been uniformly recognized and enforced by the courts.

In the case of *New Orleans v. Stafford*, 27 La. Ann. 417, 21 Am. Rep. 563, it was said: "There is in the defendant's case no room for any well-grounded ²¹¹ complaint of the violation of a vested private right, for the privilege, if he really possessed it, of keeping a private market, was acquired subordi-

nately to the right existing in the sovereign to exercise the police power to regulate the peace and good order of the city, and to provide for and maintain its cleanliness and salubrity. . . . We presume that it will not be denied that, under circumstances of peril and emergency, the law-maker would have the right to abolish or suspend an occupation imperiling the public safety. This power is inherent in him. He may exercise it prospectively, for prevention, as well as *pro re nata* for immediate effect. It is within his discretion when to exercise this power, and persons under license to pursue such occupation as may, in the public need and interest, be affected by the police power, embark in those occupations subject to the disadvantages which may result from a legal exercise of that power": See, also, *Morano v. Mayor*, 2 La. 219; *First Municipality v. Cutting*, 4 La. Ann. 335; *State v. Gisch*, 31 La. Ann. 544; *New Orleans v. Wolf*, 36 La. Ann. 986; *State v. Natal*, 38 La. Ann. 967; *State v. Natal*, 39 La. Ann. 439, 1 South. 923; *Gossigi v. New Orleans*, 41 La. Ann. 522, 6 South. 534; *State v. Garibaldi*, 44 La. Ann. 809, 11 South. 36; *Natal v. State*, 139 U. S. 621, 11 Sup. Ct. Rep. 636.

Judge Dillon says upon this subject: "Many of the powers exercised by municipalities fall within what is known as the police power of the state, and are delegated to them to be exercised for the public good. Of this nature is the authority to suppress nuisances, preserve health, prevent fires, to regulate the use and storage of dangerous articles, to establish and control markets and the like; . . . every citizen holds his property subject to the proper exercise of this power, either by the state legislature, directly, or by public or municipal corporations to which the legislature may delegate it": 1 *Dillon on Municipal Corporations*, 4th ed., sec. 141.

2. It is urged that ordinance No. 312, new council series, is unconstitutional, in that it deprives the defendant of his liberty and of his property without due process of law. This objection is answered by the opinion of the supreme court of the United States in the case of *Natal v. State*, 139 U. S. 621, 11 Sup. Ct. Rep. 636, as follows, to wit: "The plaintiffs in error were severally complained of, tried, convicted, and sentenced in a recorder's court of the city of New Orleans, for keeping a private market, in violation of paragraph 4 of an ordinance of the city, copied in the margin, and passed under the authority conferred by the statute of Louisiana of 1878, chapter 100, as follows (quoting the statute). ²¹² The cases

were consolidated and on appeal to the supreme court of the state the judgments were affirmed: *State v. Natal*, 39 La. Ann. 439, 1 South. 923. The plaintiffs in error contended in the recorder's court, and afterward assigned for error, that their privileges and immunities as citizens of the United States had been abridged, and that they had been deprived of liberty and property without due process of law, and had been denied the equal protection of the law, contrary to the fourteenth amendment of the constitution of the United States. The case is too plain for discussion. By the laws of Louisiana, as in states where the common law prevails, the regulation and control of markets for the sale of provisions, including the places and distances from each other at which they may be kept, are matters of municipal police, and may be intrusted by the legislature to a city council, to be exercised as, in its discretion, the public health and convenience may require: Citing authorities. The ordinance of the city of New Orleans prohibiting the keeping of a private market within six squares of any public market of the city, under penalty of a fine of twenty-five dollars and of imprisonment of not more than thirty days, if the fine is not paid, was within the authority constitutionally conferred upon the city council by the legislature of the state. A breach of such an ordinance is one of those petty offenses against municipal regulations, which, in Louisiana, as elsewhere, may be punished by summary proceedings before a magistrate, without trial by jury. . . . Judgment affirmed."

3. But it is said that the defendant in this case, and others similarly situated, will be compelled to abandon the private market business because the ordinance complained of will force them into the uninhabited sections of the city, where such business will be unprofitable. The act of 1874, as we have seen, prohibited private markets within twelve squares of the public markets, a greater distance (as compared with a smaller population) than the three thousand two hundred feet prescribed by the present ordinance. The act was, however, held by our predecessors in this court to be constitutional: *New Orleans v. Stafford*, 27 La. Ann. 417, 21 Am. Rep. 563. And if it be true, as was said by the supreme court of the United States, in the case cited above, that "the regulation and control of markets for the sale of provisions, including the places and the distances from each other at which they may be kept, are matters of municipal police and may be intrusted by the legislature to the city council, to be exercised as, in its discretion, the

public health and convenience may require," it is plain that the distance between public and ²¹³ private markets may as well be fixed at three thousand two hundred feet as at twelve, or nine, or six squares; and the fact that a particular individual is unable to find a place beyond the prescribed limit within which he can conduct his business profitably does not affect the question, since, in the exercise of the power and discretion vested in it, the council might at once, and in direct terms, prohibit the sale of provisions elsewhere than in the public markets. Mr. Tiedeman in a late work entitled "State and Federal Control of Persons and Property," volume 1, page 557, says: "Not only has the legislature exercised the power of confining the prosecution of certain trades to certain localities, but it has very often, particularly in respect to the vending of fresh meat and vegetables, prohibited the plying of the trade in any other place than the market which is established and regulated by the government. This regulation is very common in all parts of this country, and has frequently been the source of litigation, but it has generally been held to be reasonable."

And he cites a number of authorities in support of the view thus expressed, and quotes in extenso from the opinion in *New Orleans v. Stafford*, 27 La. Ann. 417, 21 Am. Rep. 563, as forcibly presenting the "reasons which justify this police regulation." Judge Dillon writes to the same effect, viz.: "The states, under their police power, may delegate to municipal corporations the authority to establish or authorize the establishment of markets, and it is competent to such corporations, under proper grants of power, to enact ordinances prohibiting sales and purchases of marketable articles, except at designated market places. . . . In England, the regulation of markets by by-laws has long been exercised, and such by-laws are sustained as being reasonable and conducive to the health and good government of the municipality. In this country the practice is almost universal on the part of the legislature to confer upon the municipal agencies more or less authority with respect to markets and market places, and such grants are not so strictly construed as those which invest the corporation with a power of a more extraordinary or unusual character; at least such is the case unless a monopoly in favor of private individuals is sought to be sustained, against which the courts strongly lean": 1 Dillon on Municipal Corporations, 4th ed., sec. 1380.

"There can be no doubt," said this court, "that the city, under the legislative permission can forbid the opening of markets at designated ²¹⁴ places, and such forbidding is an exercise of its power to regulate markets": *State v. Gisch*, 31 La. Ann. 544.

4. It is claimed that the ordinance in question unjustly discriminates in favor of certain persons who have obtained contracts to establish markets within three thousand two hundred feet of the public markets. It appears from the record that the city saw proper to arrange for the establishment of markets in a few localities where they were, presumably, needed, by making contracts whereby certain individuals agreed to build such markets and to convey the same, with such ground as they were to be built upon, to the city; and thereafter to maintain such markets, subject to all the regulations applicable to public markets, on condition that in lieu of a sum of money to be paid by the city, in cash, such persons should be allowed to recover the price, or value, of the property by collecting the revenues of the markets, as fixed and regulated by the city during a certain number of years. In other words, they are lessees who give the property in consideration of their leases instead of paying a fixed amount per annum or a proportion of the revenue. The validity of a contract such as that described has been affirmed by this court in the following terms, to wit: "A municipal corporation has the power to contract with an individual to authorize him to build a market-house, rent stalls, and collect dues during a specified period, with the consideration that the land, which is his property, and the improvements upon it, shall be conveyed to the city, and that the same, at the expiration of the term, shall be turned over, absolutely, in good order to the corporation. The land and constructions become municipal property at the signing of the contract, and the ownership becomes absolute at the expiration of the time in the city. The market thus put up is a public market, and any private market found within the prohibited distance of six squares from it is there kept in violation of law": *State v. Natal*, 41 La. Ann. 887, 6 South. 722; *State v. Gisch*, 31 La. Ann. 544; *State v. Sarradat*, 46 La. Ann. 700, 15 South. 87; *New Orleans v. Kientz*, 52 La. Ann. 950, 27 South. 344.

Judge Dillon refers to the case of *Le Claire v. Davenport*, 13 Iowa, 210, in which, overruling *Davenport v. Kelley*, 7 Iowa, 102, it was held that a corporation invested by its charter

with power "to erect market-houses, to establish markets and market places, and to provide for the government and regulation thereof," was authorized to pass an ordinance delegating to individuals the right to erect market-houses and to charge rent for the stalls, without reserving to itself the control of the ²¹⁵ same, and he dissents from that doctrine: 1 Dillon on Municipal Corporations, 4th ed., sec. 385. But neither he, nor any writer, nor any adjudged case, so far as we are informed, questions the authority of a corporation, having the power to regulate markets, to farm them out, provided the control of the rates charged and of the markets is reserved to the corporation. The counsel for the defendant, in arguing that the provisions of the city charter of 1870, authorizing the city "to establish markets and to farm out the revenues thereof," have been repealed by the charters of 1882 and 1896, and in referring to the latter acts as governing the validity of the ordinances, which are in evidence, authorizing the building of markets by individuals, have apparently lost sight of the existence of Act No. 116 of 1888, which they nevertheless invoke in behalf of their client, and which does not appear to be in conflict with, and hence does not appear to have been repealed by, either of the acts last above mentioned: *State v. Natal*, 39 La. Ann. 439, 1 South. 923. The right of the city of New Orleans to farm out the markets has, however, always been recognized as resulting from provisions more general than those contained in the acts of 1882 and 1896, and in the case of *State v. Natal*, 41 La. Ann. 887, 6 South. 722, it was held to have been included among the powers conferred by the charter of 1856 as "necessary for the proper administration of a municipal government."

5. It is said that it is the purpose of the ordinance which is here complained of to force the defendant into one of the markets last above referred to, or into a market operated by the city, in order to create a monopoly in favor of the grantee of such market, or to increase the revenue of such grantee, or of the city.

The answer to this is, that the establishment of public markets and the prohibition of private markets are within the legislative discretion, and the exercise of such discretion cannot be inquired into by the courts, unless the law-maker has exceeded his power, or fraud is imputed, or there is a manifest invasion of private right. That neither the state, in the adop-

tion of Act No. 34 of 1900, nor the city, in the adoption of ordinance No. 312, new council series, have exceeded their powers, respectively, is perhaps sufficiently evident from what has already been said and from the authorities cited. More than fifty years ago, Chief Justice Eustis, as the organ of this court, said: "The right to establish markets is a branch of the sovereign power, and the right of regulating them is necessarily a power of municipal police": ²¹⁰ Citing Blackstone's Commentaries, 274; Domat's Droit Public Library 1, sec. 3; First Municipality v. Cutting, 4 La. Ann. 336.

And as far back, almost, as our jurisprudence goes, there are reported cases between the city of New Orleans and the farmers of the markets, or of the duties imposed upon venders of provisions: Griffon v. Mayor etc., 5 Martin, N. S., 279; Mayor etc. v. Peyroux, 6 Martin, N. S., 155.

"But," asks the learned counsel for the defendant, "why is it within the legislative discretion to deal with persons engaged in the lawful business of private market keeping otherwise than with those engaged in any other lawful business, and do we not reach the limit of legislative power before reaching the point at which such business is suppressed?" The answer to this, we think, is also to be found in the authorities cited. There are certain trades and occupations which, for various reasons, by consensus of opinion among all civilized peoples, fall within what is called the "police power," and the reason for their doing so is so deep-seated as to have become a matter of law as well as of fact. Quoting again from an author who has already been referred to, he says, speaking of police regulations: "The instances of this kind of regulation are very numerous. Slaughter-houses have been confined to certain localities; the sale of fresh meat and vegetables has been prohibited, except in the public markets where the article exposed for sale may be conveniently inspected. In the same way may the manufacture of pressed hay, the maintenance of dairies, the cultivation of land within the limits of a town, and the storage of cotton and of other combustible material, such as oil and gunpowder, be prohibited in the densely settled parts of the city, and the prosecution of such trades be confined to less dangerous localities. In the same way, etc.": 2 State and Federal Control, etc., 740.

It follows from this that the question whether it is advisable, from a sanitary point of view, to restrict the sale of fresh meat and vegetables in New Orleans to markets which are controlled

by the government and which are subject to police inspection is not one which, for the purposes of a case pending in court, can be affected by the opinion of this individual or that one, since, as a matter of law and of settled jurisprudence, it is a question, the determination of which, from the foundation of the state and under the dominion of seven constitutions, has uniformly been held to belong to the legislative department of the government. If it were shown, as is claimed by the defendant, that ²¹⁷ the purpose and effect of the ordinance under which he is prosecuted is to establish a monopoly, the courts, by the terms of the act authorizing said ordinance, and, under the constitution, might come to his relief. But the fact that all dealers in the commodities specified in the ordinance may be obliged to transact their business in the public markets is not the establishment of a monopoly within the meaning either of the act in question or of the constitution, since the markets are open to them all, upon the same terms, and the charges are regulated by law. It might with equal propriety be said that the state or city enjoys a monopoly in exercising any other governmental function, as in the administration of the wharves or of the system of quarantine, and the claim would be well founded in a limited sense, but not, as we apprehend, in the sense in which the term is used in the argument which we are now considering. How far this court would feel authorized to interfere upon a claim supported by evidence that the revenues derived from the markets are larger than are necessary for their maintenance is a matter which need not be considered, as we find no such evidence in the record.

Judgment affirmed.

MUNICIPAL REGULATION OF MARKETS is discussed in the note to *Jacksonville v. Ledwith*, 23 Am. St. Rep. 581-584. A state has the right to regulate markets for the sale of produce, and may delegate that power to municipalities. A city having power to establish public markets has power to prevent the establishing of private markets: *New Orleans v. Graffina*, 52 La. Ann. 1082, 78 Am. St. Rep. 387, 27 South. 590. A municipal corporation may fix the places at which food commodities may be sold: *State v. Davidson*, 50 La. Ann. 1297, 69 Am. St. Rep. 478, 24 South. 324; and may forbid the sale of fruit, vegetables and other articles of food by peddlers within six squares of the public markets: *State v. Namias*, 49 La. Ann. 618, 62 Am. St. Rep. 657, 21 South. 852.

COBURN v. MORGAN'S LOUISIANA AND TEXAS RAILROAD COMPANY.

[105 La. 398, 29 South. 882.]

RAILROADS—TICKETS—TIME LIMITATION.—The purchaser of a railroad passenger ticket must take notice of the time limitation printed or stamped on its face or back. A limit of one day is reasonable and valid.

No counsel.

398 PROVOSTY, J. The plaintiff bought from the defendant railway company **399** an ordinary ticket for passage from New Iberia to Opelousas, which two points are distant from each other only a few hours' travel. Fifteen days after purchasing the ticket plaintiff tendered it in payment of his fare on one of the trains of the defendant company. On the face of the ticket was printed the following: "Good for one continuous passage commencing only on date stamped on back." On the back of the ticket there was stamped the date of the purchase. The conductor refused to receive the ticket, assigning as his reason that the time limit had expired, and on plaintiff's refusal to pay fare, he ejected him from the train. Hence this suit, in damages for a wrongful ejection.

The case comes to us from the court of appeals of the fourth circuit sitting for the parish of Iberia, the judges propounding to us for instructions three questions.

1. "Is the limitation of one day on an ordinary first-class passenger ticket a reasonable regulation?"

This court having heretofore, in the case of *Rawitzky v. Louisville etc. R. R. Co.*, 40 La. Ann. 47, 3 South. 387, announced as settled law that a railway company may place a time limit on its passenger tickets, we assume that this question relates not to the reasonableness of placing a time limit on passenger tickets, but to the reasonableness of a time limit so short as one day. We assume, furthermore, that the question has reference solely to the time within which the traveler shall set out on his journey. We are not informed by the record what were the grounds on which the reasonableness of this time limit was impugned in the lower court. To us the limit appears to be entirely reasonable. It could be unreasonable only if it were adopted without any useful purpose in view, or if it did not allow the traveler sufficient time in which to buy his

ticket and take his train; but we must assume that it has been adopted by the railroad for the better management of its business, and it seems to allow to the passenger all the time he can possibly need to buy his ticket and take his train. We are not questioned as to whether the limit may not become inoperative in any given case owing to special circumstances, and as to that we have nothing to say.

2. "Is the buyer of such ticket charged with knowledge of such a limitation by the fact of its being printed on the face of the ticket?"

3. "Is the purchase of the ticket a contract which requires that the railroad company should at the time the ticket is purchased, give the purchaser actual knowledge of the limitation in order to bind him to such limitation?"

⁴⁰⁰ These two questions are at bottom one; they inquire as to the nature of the time limitation on passenger tickets; whether it is a mere matter for the carrier to regulate, very much as the time for the departure of trains is, or whether it is a matter of contract between the passenger and the carrier, and therefore a matter the provisions as to which are not binding on the passenger without his actual knowledge, and his consent, express or implied.

We think the limitation is in the nature of a mere regulation, and that the passenger must take notice of it, as he must do of all the other reasonable rules and regulations of the railroad on which he travels. Of course, before the passenger can be expected to conform to the carrier's rules and regulations these rules and regulations must be made known to him in some way. Mere posting of notice that tickets are limited, without printing on the ticket or other notification, has been held by the supreme court of New Hampshire to be sufficient to bring to the passenger the knowledge of the limitation, so as to make the limitation binding on him (*Johnson v. Concord R. R. Corp.*, 46 N. H. 213, 88 Am. Dec. 199); and this decision is referred to, apparently with approval, by text-writers. But be that as it may, certainly a limitation printed on a ticket is binding on the passenger. As to this the law is well settled. "It is now definitely settled that a stipulation in a ticket limiting the time within which it shall be used is valid and binding on the passenger": *Fetter on Carriers of Passengers*, p. 731, par. 285, citing a number of cases.

"When on its face the ticket is issued available for a limited time only, the holder thereof will not be entitled to passage by virtue of it after the expiration of the time specified": 25 Am. & Eng. Ency. of Law, 1093, verbo "Tickets and Fares."

"A railway passenger who accepts a ticket is bound by its terms to the same extent as if he had by formal agreement entered into such a contract with the company": Am. & Eng. Ann. Gen. Dig., verbo "Carriers, Tickets," No. 73, citing a number of cases.

The authorities referred to in the record as having been cited by plaintiff to the contrary of the above must be read in the light of a distinction between the time limit on a ticket and the limitation of the carrier's liability under his contract for carriage; when so read the authorities in question are found not to conflict with the extracts here given. The time limit on the ticket is a matter of regulation by the carrier, of which the passenger must take notice, and which may be brought to his ⁴⁰¹ attention by being merely printed on the ticket; whereas, the limitation of the legal obligations of the carrier is a matter of contract between the carrier and the passenger, which, in order to be binding on the passenger, may have to be shown to have been brought to his attention at the time of the formation of the contract.

We answer the first and second questions in the affirmative, and the third in the negative.

Nicholls, C. J., and Blanchard, J., take no part in this decision.

RAILWAY TICKET—TIME LIMIT.—It is held in *Boyd v. Spencer*, 103 Ga. 828, 68 Am. St. Rep. 146, 30 S. E. 841, that a railroad ticket for which full fare has been paid, and which has a limitation as to time stamped upon it, but of which the purchaser has no notice at the time of purchase, entitles him to passage after the time stamped upon the ticket has expired.

LAMPKIN v. McCORMICK.

[105 La. 418, 29 South. 952.]

RAILROADS—STREETS—PLACES OF DANGER.—Open spaces between railroad tracks on a public street, left unimproved and occupied by railroad tracks to the exclusion of other vehicles, with the consent of the city council, are places of danger, and persons occupying them are neither trespassers nor licensees. It is the duty of the railroad company to use proper care and take necessary precautions to prevent injury to persons occupying such open spaces.

RAILROADS—CONTRIBUTORY NEGLIGENCE OF PERSON INJURED.—Railroad companies operating trains through danger points in the streets of a city must use proper care for the safety of persons upon such streets, and if the companies entirely fail in this regard they must respond in damages for injuries to persons caused by them, although such injuries are due to some extent to the imprudence and forgetfulness of the person injured. The fact that if the duty of care and caution owing from the railroad company had been performed in the particular case, it would have been unavailing to prevent the injury, is immaterial and cannot be set up as a defense.

Sutherlin & Hall, for the appellant.

Wise & Herndon, for the appellee.

418 NICHOLLS, C. J. In the petition filed by the plaintiffs they averred that J. H. McCormick, in his capacity as receiver of the Vicksburg, Shreveport, and Pacific Railroad Company, was indebted to them in the 419 sum of ten thousand and thirty-eight dollars and ten cents, for which they prayed judgment. They alleged that said corporation, with all its property, was placed by judicial decree of the circuit court of the United States for the fifth circuit and the western district of Louisiana, at the said city of Shreveport, rendered on the twenty-first day of April, A. D. 1900, in the hands of said J. H. McCormick, as receiver, with the authority and directions to him to take possession of all the property of said corporation, and operate and cause to be operated the said line of railroad as it had theretofore been operated by the said corporation; and that in the operation of said railroad by said receiver under his said appointment in said receivership, through his servants and employés, their son, Norman A. Lampkin, was struck, knocked down, and run over, and thereby injured and killed by a moving train of freight-cars of said railroad, in said city of Shreveport, on or about the twenty-sixth day of

June, A. D. 1900, by reason of the torts, faults, wrongs, carelessness, omissions, and gross negligence of the servants and employes of said receiver in charge of and operating the said train of freight-cars; and that said accident happened on Cotton street in said city, between Commerce or Levee and Market streets. They entered into a minute description of the locality where the accident occurred and the circumstances connected with the same.

The defendant answered, pleading the general denial and averring contributory negligence on the part of the plaintiff. The jury returned a verdict in favor of the defendant and judgment was rendered accordingly. Plaintiff appealed.

The evidence shows that the railroad of defendant company enters the city of Shreveport from the east over a bridge spanning the Red river. The west end of the bridge rests upon the edge of Levee or Commerce street, which runs along the river front, between the city and the river. The bridge is opposite to the mouth of Cotton street, and the tracks of defendant's road run from the Red river bridge, across Commerce street and up Cotton street, for several blocks; its freight depot being on the side of Cotton street between Commerce street and Spring street, the next cross street back; the passenger depot being several blocks farther up in the city. Spring street crosses Cotton street ⁴²⁰ on a high overhead bridge, supported by wooden posts and sills resting upon the ground. The bridge has several spans through which there are open spaces and railroad tracks.

The Shreveport and Red River Valley Railroad also approaches the city over the same railroad bridge, over the Red river, and uses the tracks of the defendant company back as far as Spring street. At that point, the trains are stopped, switched off and backed down to its own depot on Red river just below the railroad bridge.

There are at Spring street two or three tracks of the defendant company, which run parallel to each other, the main track being in the center, and the sidetracks being alongside with intervening spaces. The evidence shows that many persons go to Spring street when the passenger trains of the defendant company and those of the Red River Valley Railroad reach that point, in order to see or meet passengers or to board the trains, and that passengers frequently leave the trains at that point to go into the city. The point in question is not

one provided by either company for the receiving or landing of their passengers; there are no platforms placed there nor other arrangements made for the convenience of passengers. The companies are much opposed to their passengers getting on or getting off at that point and have tried, but in vain, to prevent it.

On the morning of June 26, 1900, a young colored man named Norman Lampkin, living with his parents in Shreveport, left his home and went down to the overhead bridge at the corner of Cotton and Spring streets and sat down there. As the passenger train of the Red River Valley road was approaching Spring street, on the main track of the defendant company, he rose from his seat and walked to meet it, when it should make its usual stop. What his object or purpose was in going to the train the record does not disclose. He was not an employé of either company, nor were there any contractual relations between them.

As the Red River Valley train was reaching its switching point at the corner of Spring and Cotton streets, from the Red river railroad bridge, a freight train of the defendant came backing down opposite to it, moving east toward the railroad bridge. The sides of the cars of each company projected on each side about two and a half feet beyond the rails on the tracks. As the freight train passed down it struck and immediately killed Lampkin, who was then in the space between the two tracks which the trains occupied, and so near to the rail of the sidetrack of the defendant company as to be reached by a projecting corner of ⁴²¹ one of the cars on that track. The freight train consisted of about sixteen or eighteen cars. Its engine was at the end of the train farthest from the direction in which the train was being moved. The train was moving slowly, at a not greater rate of speed than two or two and a half miles per hour. There was no person on the car at the end of the freight train to keep an outlook upon the track ahead, nor upon the spaces between the tracks to give warning of the approach of the train; nor was there any person stationed for the same purposes at the point where persons were likely to be found, in the spaces between the tracks, when the passenger trains came in or out. A brakeman on the top of the third car from the end of the freight train was the employé of the defendant nearest to the scene of the accident.

Defendant claims that there is no such street as Cotton street in the city of Shreveport; that what is called Cotton street is an open space appropriated for the tracks of its company by the city council; that there are no sidewalks upon the so-called street, and no paths or ways for either footmen or vehicles; that it is occupied by a network of railroad tracks; that there is no indication to anyone of the locality being other than a railroad track yard; that there is no place for the travel of either vehicles or foot passengers along the street and it is in fact not traveled. Cotton street, so called, is in fact during a part of its length almost exclusively used for railroad purposes—tracks with spaces between the tracks covering almost the whole width of the streets, but the fact remains that from a legal standpoint the tracks are laid in the public street of the city, and that from a legal standpoint the general public have a legal right of passing along and over the street.

The right of occupation granted to the defendant company by the city council, along the street, was granted subject to, and was received subject to the rights of the public, along and over the same, but the rights and obligations of the latter were modified to some extent by the grant to the railroad company. We cannot deal with the accident under inquiry in this case from the standpoint of Lampkin's having occupied when he was killed the position of either a trespasser or a licensee. Defendant introduced a number of witnesses to prove the fact that the getting on and off the train of passengers at or about the Spring street bridge was in opposition to the wishes of the railroad companies, and contrary to the instructions given to their conductors, but that fact is an irrelevant one in this particular case, where the party who was killed ⁴²² had not been a passenger on their trains, nor was he attempting to become such. The important question is whether persons were accustomed, rightly or wrongfully as a fact, to congregate at this particular place and by so doing made it a point of danger to life and limb. We think the evidence establishes that it was a danger point and that the parties operating trains had every reason to believe and know that it was such, and that they were called upon to govern their actions accordingly.

Defendant urges that it would be unreasonably onerous to force it to place flagmen or policemen on the streets, or to place a brakeman at the rear end of each backing car or train, as it is constantly making up or breaking trains and moving

them at all hours in different directions; that there is no conventional or statute requirement upon it to do so.

It may be true that the city, in granting defendant its right to lay its track upon the street, did not impose upon it these obligations, and that they were not imposed on it by general ordinance or statute, but there are certain obligations upon railroad corporations which exist independently of convention or ordinance or statute. There is a duty imposed upon everyone, whether natural persons or artificial persons, to avoid by proper care doing injury to others through their fault: Civ. Code, 666-2315.

In *Hamilton v. Morgan's etc. S. S. Co.*, 42 La. Ann. 824, 8 South. 586, this court said: "That in running a train backward through streets the engineer should see that the brakeman is at his post and keep a lookout on the track to warn in case of danger. It is the duty of the fireman to ring the bell continually while passing through a town or village; that it would not give its sanction to the least absence of an employé of a railroad, when a serious accident happens while passing through a street of a town; that the danger to human life was too great, and employés, to be relieved from all responsibility, must be at their posts." We have on several occasions repeated this same caution.

We have declared that the greater the danger to the public the greater should be the vigilance exercised and precautions taken to avoid it. If railroad corporations passing through the streets of a city fail to exercise any vigilance and to take any precautions by reason of the pecuniary expense which this would entail, they must be made to know that they assume the risks of resulting accidents, and must take the legal consequences of their balancing the chances. Defendant urges in this particular case that even had there been a brakeman upon the rear end ⁴²³ of the backing train at the time of the accident, the deceased placed himself in a position of danger so shortly before he was struck and killed that the brakeman could not have possibly avoided the accident by anything he could have done. That proposition is by no means established as a fact, and it is a dangerous course for the companies to pursue to fail in their duty, and to then argue that no good would have been accomplished had the duty been fulfilled. The proper course is to perform the duty, leaving results to be actually tested by the facts of each special case.

The evidence does not show that there exists on Cotton street any point specially dangerous other than this particular place, at or near the Spring street bridge, and it would have been no very onerous obligation upon the defendant to have stationed a man or men at that place, to secure the public safety. It may be true that an accident might happen anyhow, but none the less the defendant should have taken precautions to avoid it and to minimize the danger, which would serve them in good stead. The record does not show how many persons were at this particular point when the accident occurred.

This case resembles in a number of its features that of *Downing v. Morgan's etc. S. S. Co.*, 104 La. 508, 29 South. 207, recently decided by this court. In both cases there was the killing of a man for want of proper precaution by the backing down of a freight train. In both cases the freight train moved opposite a danger point in the streets of a town simultaneously with the passing of a passenger train upon a parallel track, when the attention of persons standing along or between the tracks would be likely to be attracted by the passenger train, and when the noises from the passenger train would be likely to conceal the approach of the freight train. In both cases there was a failure on the part of the parties operating the freight to exercise proper care and take proper precautions while moving backward upon the track, to give notice of its approach, and to warn parties standing on or near its tracks of their danger.

In the *Downing* case there was no evidence before the court showing the circumstances under which the railroad tracks had been placed in the street, and whether the title of the land upon which the tracks were laid was in the railroad company or in the public, and therefore whether the party killed was or was not a trespasser or a licensee, but in the present case the deceased was unquestionably upon a public street and not on defendant's track when killed, and he was neither a trespasser nor a ⁴²⁴ licensee. In the *Downing* case the deceased was standing on or near a practically abandoned spur-track, on which he had no reason to apprehend the approach of a moving train, while the parties operating the freight train had reason on their part to believe that there would be danger, for parties standing where the deceased was standing, while in the present case both the deceased and the parties in charge of the freight train must have known, or be presumed to have

seen and known, of the dangerous character of the situation, and each and both held to increased care and vigilance.

The defendant insists that the deceased was backing toward the freight train, and was still moving when he was struck and killed, and if not actually moving he had just come to a halt; that while the space between the tracks was sufficient for safety, yet the space over which he backed was short and they could not anticipate he would move into danger. It sought to establish that deceased was not struck by the first, but by the second or third car of the train, but this contention it did not sustain.

There is, as usual, a conflict of evidence as to the circumstances under which the deceased came to his death. Mercer, a farmer, living in Bossier parish (plaintiff's witness), testified that he was a passenger that day on the incoming passenger train of the Red River Valley train, and was sitting and looking out of the window, on the side of the car toward where the deceased was killed, the side next to the defendant company's switch (sidetrack); he was about a car's length from the deceased when he was struck; he saw him just as the train struck him; the first he noticed, the boy seemed to be standing with his back to the defendant's train and he was struck; saw him just about the moment that the train struck him; he was standing with his back to the track of the defendant company, which was parallel to that on which witness was and parallel with main line of the defendant company. He seemed to be looking at the Valley train as it ran in on the main line. He had his face toward the Valley train and his back was toward the track the other train was on. He saw the collision; he might have noticed the boy before, but did not pay any attention to him; the train seemed to strike him on his side. The defendant's train—a freight train—was backing toward the east, toward the railroad bridge over Red river, the Valley train was moving to the west—going into the city. The Valley train was moving very slowly; it had nearly come to a stop. Two brakemen came up along the ground by the side of the track after the ⁴²⁵ deceased was struck, but not before; there might have been some one on top of the car, but witness did not see anyone; he was not paying any attention to it until the man was struck; he did not notice whether the train on which he was was making a noise at the time; the only noise it could have made at the speed it was going was the escaping of steam.

The defendant's train was moving very slowly; it was nearly

at a stop and did stop in about a car's length; it was a long freight train; he could not tell whether there was a ringing of the bell on defendant's train; there are freight and switch engines and trains moving in the yard nearly all the time; the yard is filled up with tracks; witness has seen a policeman at the point since the accident; was told he had been placed there to keep people from getting off the train.

Tom Pattison, a drayman in the employ of Dreyfous & Co. (plaintiff's witness), was at the defendant company's track right below the Spring street bridge when the deceased, Norman Lampkin, was killed; he was sitting on his wagon, which was facing the Red river; he was looking at the Valley train. The boy was standing there looking at the Valley train coming in; he was standing a little too close to the Valley train and so he backed back, and just at that time the defendant's train was coming, one car under the bridge, and the boy backed a little too far and this train knocked him down. He backed until he was near enough for the front advancing car to strike him and pass between witness and the boy; the latter had his face toward the Valley train at the time this train struck him, his back being toward the one that struck him. The backing car was about twenty feet from the car when he stepped back; there was no one at all on the advancing front car—which was the one that struck him; witness heard no one call out to him or give him warning to get out of the way; never heard anyone say anything to him and never saw anyone there; did not hear the man make an outcry; witness made a mark on the map introduced in evidence showing the place he (the witness) was at when the accident occurred. The following questions and answers were asked and answered by this witness on cross-examination: Q. If this man who was struck by the train had not stepped back just as he did, this freight train would not have struck him, would it? A. No, sir; I reckon not. 426 Q. It was his stepping back, then, that put him in the way of that freight train which hit him? A. Yes, I reckon so. Q. In other words, if he had stayed where he was before stepping back, he would not have been struck—but would have been clear of both trains? A. I do not know, sir. Q. Was there space in there sufficient for persons to stand with safety between the two trains? A. Yes, sir.

Skirring, the engineer on the Red River Valley train, testified that as the train on which he was approached the bridge on Spring street, the deceased was sitting near the end of the

sill the uprights stand on, under the bridge, talking to another man. They both got up and the man killed was ahead of the other and stepped right in front of his (witness') train, facing it—with his back to the approaching train of the defendant company, and went sideways toward that track. There were two coaches on witness' train that morning and his engine was right under the bridge and stopped.

When the engine passed him the man was all right, walking down the track (open space?) toward the sidetrack of the defendant company. As the train approached the head car hit him on the shoulder and knocked him down. There was plenty space enough between the two tracks for him to have been safe if he had not gone too far; just before he was struck the man was clear of the car; while the train was still moving he stepped in the way and it struck him; he had his back to that train and was looking in the direction of the Valley train; just before he was struck he was entirely clear of the defendant's train; he was not on the track at all—he was between the two tracks and entirely clear of the tracks until the defendant's train got within six feet of him, he supposed, and he was still going sideways stepping toward that sidetrack, getting farther away and walking into the defendant's track. He was clear of the track until the train got within six feet of him, and it was moving toward him all the time, and while the train was moving and he was going on to the defendant's track they could not have stopped it.

It would have been impossible for them to have done so; they could not have done more than they did; when the train was moving the trainmen could not have stopped it in time to have prevented hitting him if there had been one hundred men on the train. Trains were backing in there all the time; when the man was struck he was looking up toward the Red River Valley train; he was kind of walking ⁴²⁷ sideways. The engine was under the bridge when the accident occurred; he had walked down some little distance toward the river; he was about middle ways of the front coach of the valley train; he was about twenty-five feet from the engine. Both trains were making a noise at the time. Freight-cars in particular make a noise when in motion.

Plaintiff's counsel refer the court in support of their claim, not only to the case of Hamilton heretofore noted, but to that of Curley v. Illinois Cent. R. R. Co., 40 La. Ann. 810, 6 South. 103; Peyton v. Texas etc. R. R. Co., 41 La. Ann. 861, 17 Am.

St. Rep. 430, 6 South. 690; Conway v. New Orleans City etc. R. R. Co., 51 La. Ann. 146, 24 South. 780; Barnes v. Shreveport City R. R. Co., 47 La. Ann. 1218, 49 Am. St. Rep. 400, 17 South. 782; 2 Shearman and Redfield on Negligence, secs. 471-484; Cheney v. New York Cent. etc. R. R. Co., 16 Hun, 415; Wiley v. Long Island R. R. Co., 76 Hun, 29, 27 N. Y. Supp. 722; Dunkman v. Wabash etc. Ry. Co., 95 Mo. 232, 4 S. W. 670; 16 Mo. App. (Append.) 548.

In the Curley case this court declared that a railroad company running and operating its road through the streets of a populous city is bound to observe extraordinary precautions for the safety of the public, particularly at street crossings.

We are of the opinion that the defendant company was guilty of negligence in backing the freight train down its track, past the point in question, under the circumstances disclosed by the testimony in this record, without having provided and taken precautions to notify parties who might be standing or walking there or along on its track, of its approach and warn them of their danger.

We have next to ascertain whether the plaintiff's action or inaction in the premises barred the right of recovery. Plaintiff contends that even if there was contributory negligence on the part of the party injured, recovery will not be defeated if there has been a plain disregard of that ordinary care on the part of defendant which, if exerted, would have averted the accident, causing the injuries for which damages are sought, and he cites in support of this position *Kramer v. New Orleans etc. R. R. Co.*, 51 La. Ann. 1693, 26 South. 411; *Rice v. Crescent City R. R. Co.*, 51 La. Ann. 108, 24 South. 791; *McGuire v. Vicksburg etc. R. R. Co.*, 46 La. Ann. 1543, 16 South. 457; *Nelson v. Crescent City R. R. Co.*, 49 La. Ann. 491, 21 South. 635; *Inland etc. Co. v. Tolson*, 139 U. S. 558, 11 Sup. Ct. Rep. 653; *Grand Trunk etc. Ry. Co. v. Ives*, 144 U. S. 419, 12 Sup. Ct. Rep. 679; *Conway v. New Orleans City etc. R. R. Co.*, 51 La. Ann. 146, 24 South. 780.

In *Herlich v. Louisville etc. R. R. Co.*, 44 La. Ann. 280, 10 South. 628, this court declared that on approaching a street crossing of a railroad track in a city it is the duty of a traveler to exercise his senses of sight and hearing, and look and listen for an approaching train. That his failure so to do is negligence, which in case of collision will prevent his recovery of damages for ⁴²⁸ injuries received. (In the consideration of the case it will be observed that the plaintiff, when

struck by one of defendant's engines, was on defendant's track which was laid upon its private property.) In the course of its opinion this court said it was satisfied that defendant's employés were neglectful of their duties under the general principles of law, as well as under the ordinances of the city, in reference to keeping a flagman at the street crossing, the exhibition of a red light, etc., and that the evidence rendered it exceedingly doubtful that a bell was rung or a whistle sounded; that taking it all in all the evidence made out a case of negligence on the part of the company; that they were evidently unmindful of the rights of pedestrians who had equal rights to use this crossing. The court was of opinion, however, that the plaintiff was himself guilty of negligence which directly caused or contributed to the accident by which his injuries were inflicted, and declared that the rule was a fair and reasonable one which required of travelers who resort to thoroughfares of a city, over which railroads have a right of way, to exercise the greatest possible care to avoid collisions with their trains; that ordinarily the fact that the train neglected to make statutory and customary warnings did not relieve a person approaching an open crossing from the duty of looking out on approaching the road.

The court quoted approvingly an author who, summarizing the duties of railroad companies and travelers respectively, in respect to public crossings at the intersection of public streets, said: "At the place of intersection there are concurrent rights. Neither the traveler on the common highway nor the railroad company has an exclusive right of passage. Even on a common road travelers must look out for the approach of other vehicles, and this is the more necessary at a railroad crossing, because movement on such a road is more speedy, and because the consequences of such a collision are usually disastrous. Precaution—looking out for dangers—is, therefore, a duty: Thompson on Negligence, 403; Reeves v. Delaware etc. R. R. Co., 30 Pa. St. 464, 72 Am. Dec. 713; North Pennsylvania R. R. Co. v. Heileman, 49 Pa. St. 60, 88 Am. Dec. 482.

In Conway v. New Orleans City etc. R. R. Co., 51 La. Ann. 146, 24 South. 780, this court was of opinion that there was no proper care on the part of the employé in charge of defendant's electric-car; that such care must be exercised at dangerous places on a railway to avoid inflicting injury, as the proper manning of a car requires. The plaintiff in that case, in order to board an electric-car whose stopping place was on its

track in the neutral ground on Canal street, between Baronne and ⁴²⁹ Carondelet, walked to this stopping place from the Baronne street crossing along the open space on the neutral ground between the track of the defendant company and a parallel track of the same company. It was All Saints' Day, and cars were constantly passing on this parallel track. The tracks were so close together that a person standing between the two when two cars passed each other was almost certain to be injured. The plaintiff was struck when in the act of getting into his car by the overlapping side of a car passing at that time on the other track and coming up behind him. Plaintiff, before leaving the Baronne street crossing, had looked to see whether there was a car coming up on the other track, but did not look back after he had once started between the tracks on the neutral ground.

In reference to the plaintiff's conduct, the court said: "The plaintiff did not, at the moment, suspect the threatening danger. He admits had he looked he would have had no trouble in seeing the approaching car. There was forgetfulness on his part, it is true, just prior to the accident in his listlessly walking as he did; whether it was enough to defeat the right of recovery is a question to be hereafter determined. Even if one should usually 'look and listen,' yet if the servant should have seen the danger, it is negligence not to have seen it and applied himself as far as possible to avoid the accident. Moreover, the plaintiff was on the passageway from which passengers board the train. These reasons, we think, take the case out of the rule requiring one 'to look and listen'; . . . not to have seen the plaintiff walking on so dangerous a place was culpable negligence. It must be borne in mind that passengers were invited to board the train from the space over which plaintiff was walking at the time. It devolved upon the employés of the defendant company to be careful; to run slowly at this place and to look on the entire front of the advancing car, and to exert a timely care toward protecting persons in dangerous proximity to the car. The space having been reduced by defendant's car from four and a half feet to eighteen inches, it devolved upon its employés to be careful and watchful. It does seem that with ordinary prudence and watchfulness the plaintiff would have been seen by one in charge of the advancing car. Not to have seen him, in our judgment, makes it evident there was a want of even ordinary care. If the employé had exercised the care required, the accident might

have been avoided. It certainly devolved upon the defendant's agents to carefully look. Any other rule would afford scant protection to the public and give protection to indifference 430 where there should be watchfulness. There can be no serious objection to the nearness of the tracks to each other. It is unavoidable; none the less if a proximate track give rise to more than ordinary danger, such danger should be met by corresponding precaution. Instead of care and caution which should have been exercised in passing the steam train, the record shows that the motorman never saw plaintiff, who was walking in a dangerous path between the cars; that there was no sounding of the gong nor the least warning of approaching danger. The defendant's employes upon such an occasion, particularly where there are many passengers and a number of people on the street, owed to the public reasonable care and diligence. It was the duty of this motorman to be on the constant lookout when passing the narrow strip between his car and the West End train at the stopping place of the latter; the time—about midday in November; the place—a dangerous way where passengers frequently boarded the train which plaintiff was seeking to board; the duty to be on the lookout and give warning when there was danger of accidents, all made it obligatory upon the motorman to be upon the alert. By the use of ordinary care, might not the defendant have known that plaintiff was in an exposed position which rendered it proper to give warning at this particular place, and, even at this particular place, check its car a little? In our judgment there was not sufficient care and caution taken to avoid the accident, and in consequence we think that the defendant is liable.

"Plaintiff, it is true, was in an exposed position which called for more than ordinary prudence in his movements, yet he was invited to the place where the accident occurred, and notwithstanding a slight inattention, he should not have been subject to the risk of severe injury by the negligence of the motorman."

In the Conway case the defendant company had a person on guard to see and give warning and to take precautionary steps; but he did not see. In the case at bar there was no person at all placed on guard to see and give warning; and as a matter of course no one saw Lampkin's danger and no one gave him warning. There was this difference, however, in the situation of the deceased and the defendant. There was an open view

for over a block of the present defendant's track from Spring to Market street, and its train was approaching very slowly, so that the deceased had ample time to look up the track to ascertain likelihood of danger, while the space between the two tracks on which ⁴³¹ Lampkin had gone was only a few feet wide, and he could pass from a situation of safety to one of danger in a few seconds.

The jury by a vote of ten to two rendered a judgment in favor of the defendant.

Counsel refer to the verdict of a jury in favor of a corporation as being an exceptional fact, and urge upon us the great weight which should be given to it, but we have to examine the record ourselves and determine from that examination whether the jury erred or not. For the same reasons which have impelled us to reverse or modify the verdict of juries when adverse to corporations, we must reverse or modify them when rendered wrongly in their favor. After mature deliberation we are of the opinion that the verdict rendered in this case cannot be sustained. We are of the opinion that the death of Lampkin could have been, and doubtless would have been, avoided had the defendant company, while running its train through the streets of a city, exercised the care and used the precautions which proper regard for the public safety of the individuals therein called for.

For the reasons assigned it is ordered, adjudged, and decreed that the verdict of the jury be set aside, and the judgment rendered therein be, and the same is hereby, annulled, avoided, and reversed, and it is now ordered, adjudged, and decreed that the plaintiffs herein do have and recover from the defendant, J. H. McCormick, in his capacity of receiver of the Vicksburg, Shreveport, and Pacific Railroad, the sum of two thousand five hundred dollars, with legal interest thereon from the date of the judgment herein, until paid, with costs in both courts.

Rehearing refused.

CONTRIBUTORY NEGLIGENCE IS NO DEFENSE to injuries which result from gross negligence: *Western Ry. Co. v. Mutch*, 97 Ala. 194, 38 Am. St. Rep. 179, 11 South. 894; or recklessness: *McDonald v. International etc. Ry. Co.*, 86 Tex. 1, 40 Am. St. Rep. 803, 22 S. W. 939; or willfulness: *Bolin v. Chicago etc. Ry. Co.*, 108 Wis. 333, 81 Am. St. Rep. 911, 84 N. W. 446. When at the time an injury is inflicted, it might have been avoided by reasonable care on the part of the defendant, an action lies for damages, notwithstanding the previous negligence of the plaintiff: *Deans*

v. Wilmington etc. R. R. Co., 107 N. C. 686, 22 Am. St. Rep. 902, 12 S. E. 77.

RAILWAYS — EXCESSIVE SPEED IN CITY. — In thickly settled towns it is negligence to run trains rapidly: Hicks v. New York etc. R. R. Co., 164 Mass. 424, 49 Am. St. Rep. 471, 41 N. E. 721. But it is held that though a person trespassing on a track is injured by a train running within a municipality at a speed forbidden by ordinance, he must, to entitle him to recover, prove that his injury was caused by the rate of speed, without any direct contributory negligence on his part: Reidel v. Philadelphia etc. R. R. Co., 87 Md. 153, 67 Am. St. Rep. 328, 39 Atl. 507.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

VERY v. CLARKE.

[177 Mass. 52, 58 N. E. 151.]

INSOLVENCY—PARTNERSHIP—SETOFF.—The claim of an insolvent creditor against an insolvent corporation may be proved without allowing as a setoff a debt due such corporation from an insolvent partnership of which the creditor is a member.

INSOLVENCY—PARTNERSHIP—CLAIM AGAINST SEPARATE ESTATE OF PARTNER.—A debt due from an insolvent partnership can be proved against the separate estate of one partner, who is also insolvent, only in subordination to the claims of his separate creditors.

J. B. Carroll and W. H. McClintock, for the appellees.

J. Barnes, for the appellant.

52 **HOLMES, C. J.** This is a petition by a creditor, Very, to prove a claim against the Warwick Cycle Manufacturing Company in insolvency. Very, as well as the cycle company, is in insolvency, and his claim is pressed by his assignee. The company seeks to set off a larger debt due to it from a New York partnership, of which Very was a member. The partnership also is insolvent, and the other member has disappeared, but its **53** affairs have not been brought into the Massachusetts insolvency court. The judge of the superior court, before whom the case came by appeal of the creditor, Very, allowed the claim and disallowed the setoff, and the assignees of the cycle company appealed to this court.

We are of opinion that the judge of the superior court was right. There is no doubt that apart from insolvency the setoff would not have been allowed: *Bridgham v. Tileston*, 5 Allen,

371; Snyder v. Spurr, 33 Conn. 407; Tucker v. Oxley, 5 Cranch, 34, 39. The general rule is clear, and the insolvency of all the parties does not raise an equity in favor of the creditors of the cycle company which is superior to the right of Very's personal creditors to have his personal assets applied to the full payment of their claims before any part of them is used to pay the debts of the firm to which he belonged: See Pub. Stats., c. 157, sec. 121; Williams v. Brimhall, 13 Gray, 462, 465; Addis v. Knight, 2 Mer. 117, 122; Jackson v. Clymer, 43 Pa. St. 79, 83; Wright v. Rogers, 3 McLean, 229; Fed. Cas. No. 18,090; Lowell on Bankruptcy, sec. 274. If the debt due from Very's firm to the cycle company were proved against his separate estate, it would be only in subordination to the claims of his separate creditors, which in this case would exhaust his estate: Clarke v. Stanwood, 166 Mass. 379, 384, 44 N. E. 537; M'Culloh v. Dashiell, 1 Har. & G. 96, 100, 18 Am. Dec. 171. In Tucker v. Oxley, 5 Cranch, 34, 39, the bankrupt law then in force was construed to let in partnership creditors against the separate estate on an equal footing with personal creditors: See, also, Story's Equity Jurisprudence, sec. 1437, note 1. Of course, Very's claim against the cycle company is a part of his personal assets, and if it is extinguished by setting off a claim against his firm, it is applied to payment of a partnership debt just as much as if the money were collected and then paid to the firm creditors: Williams v. Brimhall, 13 Gray, 462, 465.

It is said that but for Very's insolvency the cycle company could have got a judgment against him separately under Public Statutes, chapter 164, section 13, and thus have made his liability separate. So it might have contracted with Very alone in the first place. It is enough to say that it did not do so.

Judgment affirmed.

PARTNERSHIP.—THE INDIVIDUAL PROPERTY of a partner is applicable, in the first instance, to the payment of his individual debts: Pott v. Schmucker, 84 Md. 535, 57 Am. St. Rep. 415, 36 Atl. 592. Generally speaking, partnership creditors cannot prove in competition with the individual creditors of a partner: Thayer v. Humphrey, 91 Wis. 276, 51 Am. St. Rep. 887, 64 N. W. 1007.

THE SUBJECT OF SETOFF AFTER INSOLVENCY is discussed in the monographic note to St. Paul etc. Trust Co. v. Leck, 47 Am. St. Rep. 578-595.

SPILLANE v. FITCHBURG.

[177 Mass. 87, 58 N. E. 176.]

MUNICIPAL CORPORATIONS—LIABILITY FOR INJURIES IN STREET.—A city is not liable for an injury to one who, upon a dark night, by reason of the deceptive appearance of snow and water which fill a catch-basin, at the corner of a sidewalk, up to the level of the walk, steps off the sidewalk, slips on an iron plate properly placed over the catch-basin, and is injured.

MUNICIPAL CORPORATIONS—LIGHTING.—A city is not bound to light its streets.

EVIDENCE—OPINION—CONDITION OF STREET.—Where the evidence shows that there had been no change in the condition of a street, and there was no controversy about it, it is proper to exclude the opinion of a witness that the street was not properly constructed.

J. H. McMahon, for the plaintiff.

W. P. Hall, for the defendant.

⁸⁷ HOLMES, C. J. This is an action for personal injuries alleged to have been suffered by the plaintiff in consequence of a defect in the highway. At the trial the judge took the case from the jury, and the main question raised by the plaintiff's exceptions is whether he was right in doing so. The place of the accident was at the corner of a sidewalk where two streets met. Under the corner was a semicircular hole in the side of the curbstone, of the shape familiar in our streets for an opening into a catch basin, and seven and one-half inches high at its highest point. In front of this, on the main surface of the street, was an iron plate or lid, extending out twenty-five and three-quarters inches ⁸⁸ toward the center of the street, and with a slope of three inches from its outer edge to the hole. At the time of the accident the catch basin probably was full, snow and water stood in the street up to the level of the sidewalk, and there was evidence that this condition had continued for two days. It was dark, and the plaintiff, who was familiar with the place, but had not seen it since the snow and water had been there, mistook the water for a continuation of the concrete of the sidewalk, which it resembled, stepped off the corner, slipped on the iron plate, fell, and was hurt. Either before or as she fell her foot went into the hole above described.

We shall assume without deciding that the notice sufficiently stated the cause of the injury: *Grogan v. Worcester*, 140 Mass.

227, 4 N. E. 230. But we are of opinion that the facts disclose no defect in the highway for which the city was responsible. The combination of the hole and the iron plate was familiar and proper by itself, and it was not necessary to guard the hole against the remote chance of such an accident as the present. Whether the hole contributed to the injury appears only by conjecture, but if it did, the risk of its playing such a part was too small to entitle the plaintiff to go to the jury on that alone: See *Richardson v. Boston*, 156 Mass. 145, 146, 30 N. E. 478; *Scannal v. Cambridge*, 163 Mass. 91, 94, 39 N. E. 790; *Dayton v. Taylor*, 62 Ohio St. 11, 56 N. E. 480. The city was not bound to light the street: *Lyon v. Cambridge*, 136 Mass. 419; *Randall v. Eastern R. R. Co.*, 106 Mass. 276, 8 Am. Rep. 327. Snow and water by themselves, without more, of course are not a defect. So that the question is narrowed to whether the presence of snow and water in deceptive form, in connection with the darkness, the plate, and the hole, constituted a defect when no one and no combination of less than all the constituents would have done so. We think that the deceptive powers of water are not sufficiently dangerous, even in this combination, to make the city liable. The possibility of there being too much snow and water in the streets for a few days in the winter time is like the possibility of smooth ice, an incident of the climate which it would be unreasonable to require the city to guard against except under circumstances of greater danger than the present: See *Stanton v. Springfield*, 12 Allen, 566.

An exception was taken to the exclusion of evidence of a ⁸⁰ witness concerning the condition of the street. The configuration at the time of the accident was shown by expert testimony, photographs, and a view, coupled with the defendant's admission and the evidence of witnesses that there had been no change. There was no controversy about it. What the plaintiff seems to have been seeking to introduce was the judgment of the witness that the construction "was not proper street construction." Evidently that was the way the judge understood it, and that was the offer he ruled upon. So far as appears, the ruling was right: *Edwards v. Worcester*, 172 Mass. 104, 51 N. E. 447. But in view of our decision upon the general question, this becomes unimportant.

Exceptions overruled.

MUNICIPAL CORPORATION'S LIABILITY AS TO STREETS.
A municipal corporation is not an insurer against injury to persons

using its streets: *Nesbitt v. Greenville*, 69 Miss. 22, 30 Am. St. Rep. 521, 10 South. 452; and its neglect to keep its streets in proper condition does not render it liable when such negligence is the remote, but not the proximate, cause of injury: *Cline v. Crescent City R. R. Co.*, 43 La. Ann. 327, 26 Am. St. Rep. 187, 9 South. 122. Cities and towns have been held to be under no obligation to light highways: *Randall v. Eastern R. R. Co.*, 106 Mass. 276, 8 Am. Rep. 327.

INGRAHAM v. CHAPMAN.

[177 Mass. 123, 58 N. E. 171.]

EVIDENCE OF OWNERSHIP—DOG.—A collar worn by a dog and having a particular man's name upon it, while not conclusive evidence that such man was the owner of the dog, is admissible in evidence as tending to show that he was such owner.

Tort for the unlawful killing of the plaintiff's dog.

S. S. Taft, for the defendant.

D. E. Leary, for the plaintiff.

124 LATHROP, J. It appears from the bill of exceptions that one question in dispute at the trial was whether the plaintiff was the owner of the dog, the defendant contending that it was the property of the plaintiff's wife. It was conceded that the dog was duly licensed and registered in the name of the plaintiff, and the license was in evidence, the number of which agreed with the number on the collar. The collar was also in evidence. Upon the collar was a plate, upon which was engraved the name of the plaintiff and the registered number.

During his argument the counsel for the plaintiff contended that the fact that the name of the plaintiff was on the collar was evidence which the jury might properly consider as tending to show that the plaintiff was the owner of the dog. The defendant objected to this line of argument, and asked the judge to instruct the jury that the collar with the name of the plaintiff upon it was not competent evidence for the jury to consider upon the question of the ownership of the dog. The judge declined so to rule, and instructed the jury that the fact that the collar had a particular man's name upon it was not conclusive evidence that the man was the owner; but that it was a piece of evidence which, in connection with other evidence, the jury had a right to consider, and to give it such

weight as they thought it ought to have. The correctness of this ruling is the only question raised by the bill of exceptions.

We are of opinion that this ruling was right. The fact that the collar bore the plaintiff's name showed an act of dominion exercised over the animal while it was in his possession. It had some tendency to prove ownership, and, while not conclusive, was admissible in evidence. It is like the case of a brand or mark upon cattle, which is considered evidence of ownership unless the subject matter is affected by statute: See *People v. Bolanger*, 71 Cal. 17, 11 Pac. 799; *Wyers v. State*, 22 Tex. App. 258, 2 S. W. 722; *Tittle v. State*, 30 Tex. App. 597, 17 S. W. 1118.

Exceptions overruled.

EVIDENCE OF OWNERSHIP.—AN EARMARK on stolen animals, identified by the alleged owner as the mark used by him, is some evidence of his ownership, in a prosecution for larceny: *People v. Bolanger*, 71 Cal. 17, 11 Pac. 799.

BOND v. O'GARA.

[177 Mass. 139, 58 N. E. 275.]

ADVERSE POSSESSION — OCCUPATION UNDER A LICENSE.—Adverse possession which will ripen into a title must be with an intention to appropriate and hold as owner, to the exclusion of everyone else. Hence one who continues to hold land under a license from another, who has conveyed it, though without the knowledge of the licensee, cannot acquire title by adverse possession as against the grantee.

F. P. Goulding and W. C. Mellish, for the demandant.

H. Parker, for the tenant.

142 HOLMES, C. J. This is a writ of entry. The demandant claims title under a deed from the widow and heirs of one John Hanlon, setting up a title in them by the running of the statute of limitations. There was evidence that the holding of John Hanlon and his widow and heirs had been under a claim of right adverse to all the world. There was also evidence that their occupancy had been under a license from one Hodges, who owned the land after October, 1865, and conveyed it in October, 1866. The question raised by the demandant's bill of exceptions is whether the fact that the license was ended

in 1866 by the conveyance of Hodges necessarily made the occupation by the Hanlons adverse, if they supposed the license still to be in ¹⁴³ operation, and purported to occupy under it, but were in such relations to the land that they would have been liable to an action of trespass, or, better to test the matter, to a writ of entry at the election of the true owner.

The answer is plain. "If a man enter into possession, under a supposition of a lawful limited right, as under a lease, which turns out to be void, . . . if he be a disseisor at all, it is only at the election of the disseisee. . . . If the party claim only a limited estate, and not a fee, the law will not, contrary to his intentions, enlarge it to a fee": *Ricard v. Williams*, 7 Wheat. 59, 107, 108; *Blunden v. Baugh*, Cro. Car. 302, 303; *Stearns on Real Actions*, 2d ed., 6, 17.

It is true, of course, that a man's belief may be immaterial as such. Probably, although the courts have not been unanimous upon the point, he will not be the less a disseisor or be prevented from acquiring a title by lapse of time because his occupation of a strip of land is under the belief that it is embraced in his deed. His claim is not limited by his belief. Or, to put it in another way, the direction of the claim to an object identified by the senses as the thing claimed overrides the inconsistent attempt to direct it also in conformity to the deed, just as a similar identification when a pistol shot is fired or a conveyance is made overrides the inconsistent belief that the person aimed at or the grantee is some one else: *Hathaway v. Evans*, 108 Mass. 267; *Beckman v. Davidson*, 162 Mass. 347, 350, 39 N. E. 38. See *Sedgwick & Wait on Trial of Title to Land*, 2d ed., sec. 757. So, knowledge that a man's title is bad will not prevent his getting a good one in twenty years: *Warren v. Bowdran*, 156 Mass. 280, 282, 31 N. E. 300.

In the cases supposed the mistaken belief does not interfere with the claim of a fee. But when the belief carries with it a corresponding limitation of claim the statute cannot run, because there is no disseisin except the fictitious one which the owner may be entitled to force upon the occupant for the sake of a remedy: *Hoban v. Cable*, 102 Mich. 206, 213, 60 N. W. 466. Liability to a writ of entry and disseisin are not convertible terms in any other sense. It is elementary law that adverse possession which will ripen into a title must be under a claim of right (*Harvey v. Tyler*, 2 Wall. 328, 349), or, as it has been thought more accurate ¹⁴⁴ to say, "with an intention to appropriate and hold the same as owner, and to the ex-

clusion, rightfully or wrongfully, of everyone else": Sedgwick & Wait on Trial of Title to Land, 2d ed., sec. 576. "As Coke on Littleton, 153b, defines, 'a disseisin is when one enters, intending to usurp the possession, and to oust another of his freehold'; and therefore quaerendum est a iudice, quo animo hoc fecerit, why he entered and intruded": Blunden v. Baugh, Cro. Car. 302, 303.

The other matters apparent on the bill of exceptions were sufficiently dealt with by the judge.

Exceptions overruled.

POSSESSION, TO BE ADVERSE, must be under a claim of right, and there can be no adverse possession without an intention to claim title: Hagan v. Ellis, 39 Fla. 463, 63 Am. St. Rep. 167, 22 South. 727. Adverse possession must be open, notorious, continuous, exclusive, visible, and distinct: Cook v. Clinton, 64 Mich. 309, 8 Am. St. Rep. 816, 31 N. W. 317. Possession held under a license is not adverse: Handlan v. McManus, 100 Mo. 124, 18 Am. St. Rep. 533, 13 S. W. 207.

LAMSON v. AMERICAN AXE AND TOOL COMPANY.

[177 Mass. 144, 58 N. E. 585.]

MASTER AND SERVANT—ASSUMPTION OF RISK.—An employé assumes the risk of an obvious danger connected with his employment, where he understands the danger perfectly, and it does not depend upon the negligent act of another employé, and after making complaint and being told that he would have to continue to work under the same conditions or leave, he retains his position.

MASTER AND SERVANT—ASSUMPTION OF RISK—FEAR OF LOSING POSITION.—A servant assumes the risk of an obvious danger connected with his employment, although the fear of losing his position is one of the motives which induces him to continue his work.

E. H. Vaughan and F. P. Brady, for the plaintiff.

H. Parker and C. C. Milton, for the defendant.

¹⁴⁴ HOLMES, C. J. This is an action for personal injuries caused by the fall of a hatchet from a rack in front of which it was the ¹⁴⁵ plaintiff's business to work at painting hatchets, and upon which the hatchets were to be placed to dry when painted. The plaintiff had been in the defendant's employment for many years. About a year before the accident new racks had been substituted for those previously in use, and it

may be assumed that they were less safe and were not proper, but were dangerous on account of the liability of the hatchets to fall from the pegs upon the plaintiff when the racks were jarred by the motion of machinery near by. The plaintiff complained to the superintendent that the hatchets were more likely to drop off than when the old racks were in use, and that now they might fall upon him, which they could not have done from the old racks. He was answered in substance that he would have to use the racks or leave. The accident which he feared happened, and he brought this suit.

The plaintiff, on his own evidence, appreciated the danger more than anyone else. He perfectly understood what was likely to happen. That likelihood did not depend upon the doing of some negligent act by people in another branch of employment, but solely on the permanent conditions of the racks and their surroundings and the plaintiff's continuing to work where he did. He complained, and was notified that he could go if he would not face the chance. He stayed and took the risk: *Carrigan v. Washburn etc. Mfg. Co.*, 170 Mass. 79, 81, 48 N. E. 1079. See *Lewis v. New York etc. R. R. Co.*, 153 Mass. 73, 77, 26 N. E. 431; *Prentiss v. Kent Furniture Mfg. Co.*, 63 Mich. 478, 482, 30 N. W. 109. He did so none the less that the fear of losing his place was one of his motives: *Leary v. Boston etc. R. R. Co.*, 139 Mass. 580, 587, 52 Am. Rep. 733, 2 N. E. 115; *Haley v. Case*, 142 Mass. 316, 322, 7 N. E. 877; *Wescott v. New York etc. R. R. Co.*, 153 Mass. 460, 27 N. E. 10; *Bailey on Personal Injuries Relating to Master and Servant*, secs. 880-885.

Exceptions overruled.

A SERVANT ASSUMES THE RISKS of defects in appliances about which he is employed that are open to observation: *Taylor v. Wootan*, 1 Ind. App. 188, 50 Am. St. Rep. 200, 27 N. E. 502. See, also, *Omaha Bottling Co. v. Theiler*, 59 Neb. 257, 80 Am. St. Rep. 673, 80 N. W. 821. If a servant discovers that the service is more dangerous than he anticipated, or that there are defects in appliances making it unsafe for him to continue his employment, and notifies his master thereof, and the latter fails to fulfill his promise to repair the defect, within a reasonable time, it is the servant's duty to quit the service. If thereafter he is injured, he cannot recover therefor: *Illinois Steel Co. v. Mann*, 170 Ill. 200, 62 Am. St. Rep. 370, 48 N. E. 417.

STACK v. NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

[177 Mass. 155, 58 N. E. 686.]

TRIAL—EXAMINATION OF PLAINTIFF'S PERSON.—In an action for personal injuries, the court has no power to order the plaintiff to submit to an examination by a doctor named by the defendant.

EVIDENCE—REFUSAL TO BE EXAMINED BY PHYSICIAN—EXCLUSION.—Where, at the trial of an action for personal injuries, the plaintiff refuses to be examined by a particular physician selected by the defendant, but offers to submit to an examination by any other physician the defendant might name, the court may properly exclude evidence of the fact that the first physician later went to the plaintiff's house, and was refused leave to examine him.

J. C. Hammond and H. P. Field, for the defendant.

W. H. Brooks and W. Hamilton, for the plaintiff.

156 HOLMES, C. J. This is an action for personal injuries. The defendant denied the injuries, and, two days before a second trial, was permitted to send two doctors, who made a thorough examination of the plaintiff in company with the doctors employed by the plaintiff. After the plaintiff had closed his case, and after the defendant had called its two doctors as witnesses, it asked the court to order the plaintiff to submit to an examination by another doctor named by it. The plaintiff objected, on the ground that his relations with that doctor were unfriendly, but offered to allow an examination by any other physician whom the defendant might select. The defendant declined the offer, and thereupon the court refused to make the order, ruling that it had no power or right to make it under the circumstances. The defendant excepted.

Perhaps the words "under the circumstances" so far cut down the seemingly absolute denial of power in the first part of the ruling that it meant only to state emphatically the plain injustice and outrage which it would have been to make the order proposed. Other language used has somewhat that look. The judge probably was justified in assuming the truth of the plaintiff's statement that his relations with the doctor were hostile. He certainly was justified in assuming that the plaintiff had personal objections to him. When the plaintiff coupled with his objection an offer to accept any other doctor whom

the defendant might choose to send, bearing in mind the large possibilities that were open by telegraph and rail, he had a plain right to have his personality respected to the small extent that he asked. If that is all that the ruling meant, as it certainly was all that was needed to dispose of the matter, in our opinion it was right.

¹⁵⁷ But if the ruling requires the decision of a broader question, we agree with the supreme court of the United States, the New York court of appeals, and some other able courts, that the power does not exist: *Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. Rep. 1000; *McQuigan v. Delaware etc. R. R. Co.*, 129 N. Y. 50, 26 Am. St. Rep. 507, 29 N. E. 235; *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. 860. Many of the cases which have followed *Schroeder v. Chicago etc. Ry. Co.*, 47 Iowa, 375, in asserting the opposite opinion are collected in *Graves v. Battle Creek*, 95 Mich. 266, 270, 35 Am. St. Rep. 561, 54 N. W. 757. The need of the power easily may be exaggerated, because if, contrary to usual experience, a plaintiff should dare to refuse a reasonable examination, it would be the subject of just comment to the jury. But if the power should be deemed needful to a more perfect administration of justice, the remedy should be furnished by the legislature, which as yet has not gone so far. The statutes compel the answer to interrogatories and the exhibition of documents under the penalty of a nonsuit or default. They also empower the court to order a view of a place in question, or of "any property, matter, or thing relating to the controversy between the parties": Pub. Stats., c. 170, sec. 43. But these words do not extend to the ordering of an interference with the person of a party by some one out of court, in order to enable him to qualify himself to be called as a witness by the opposing party if the latter sees fit.

We cannot doubt that, as matter of history, the power which we are asked to assert was of a kind rarely claimed or exercised by common-law courts. It is said by Mr. Langdell that "the common-law procedure is founded upon the theory that the parties to an action owe no obedience to the court": Langdell on Equity Pleading, 2d ed., sec. 40. And although, of course, as recognized by the author, the statement must not be taken too absolutely, it indicates an important truth. It also is true, perhaps with some reservations, as observed by Mr. Justice Gray in the supreme court of the United States, that the common law was very slow to sanction any violation of or in-

terference with the person of a free citizen. The few and obsolete specific cases in which the judges or a jury inspected the person of a party have little bearing on the court's power to order him to submit to inspection in order to qualify a witness.

¹⁵⁸ If such a power existed in the practice which we inherit, it must have been enforced either by judgment in the cause or by process of contempt. We are not aware of any precedents which, apart from statute, would warrant a judge in nonsuiting a party who had made out a *prima facie* case on the ground that he refused to furnish evidence which might or might not overthrow it. As to the process for contempt, no doubt that is known to courts of common law, and we do not forget the statutes of 1887, chapter 383, section 3, whatever may be its scope. But the question remains, how far and under what circumstances the power to use that process has been exercised. The English cases cited by Mr. Justice Gray make it pretty clear that it was not exercised in a case like this by common-law courts: *Newham v. Tate*, 1 Arnold, 244; *Turquand v. Strand Union*, 8 Dowl. 201. And, if that be material, we are not aware that the English chancery ever has made such an order as was asked here.

We agree that, in view of the great increase of actions for personal injuries, it may be desirable that the courts should have the power in dispute. We appreciate the ease with which, if we were careless or ignorant of precedent, we might deem it enlightened to assume that power. We do not forget the continuous process of developing the law that goes on through the courts, in the form of deduction, or deny that in a clear case it might be possible even to break away from a line of decisions in favor of some rule generally admitted to be based upon a deeper insight into the present wants of society. But the improvements made by the courts are made, almost invariably, by very slow degrees and by very short steps. Their general duty is not to change, but to work out, the principles already sanctioned by the practice of the past. No one supposes that a judge is at liberty to decide with sole reference even to his strongest convictions of policy and right. His duty in general is to develop the principles which he finds, with such consistency as he may be able to attain. No one supposes that this court might have anticipated the legislature by declaring parties to be competent witnesses, any more than to-day it could abolish the requirement of consideration for a simple contract. In the present case we perceive no such pressing need of our

anticipating the legislature as to justify our departure from what we cannot doubt is the settled tradition ¹⁵⁹ of the common law to a point beyond that which we believe to have been reached by equity, and beyond any to which our statutes dealing with kindred subjects ever have seen fit to go. It will be seen that we put our decision not upon the impolicy of admitting such a power, but on the ground that it would be too great a step of judicial legislation to be justified by the necessities of the case.

After the judge had refused to order the plaintiff to submit to examination, the defendant attempted to make evidence for itself by sending the doctor objected to by the plaintiff to the house of the latter to ask leave to examine him. This, of course, the plaintiff refused. The defendant took a second exception to the exclusion of evidence of the request and refusal, coupled with evidence that the doctor was a competent man. So far as appears, the fact already was before the jury that the plaintiff declined to be examined by that doctor. Coupled with the plaintiff's offer, it amounted to nothing as evidence against him, but it was in for what it was worth. No doubt, in general, a refusal to be examined by a proper doctor sent by the other side would be admissible in evidence, and would be a proper subject for severe comment and a ground for adverse inference, at the very least: *Freeport v. Isbell*, 93 Ill. 381. But not only was there no such refusal in the present case, but under the circumstances, after the matter had been disposed of by the court and the defendant and the jury knew of the plaintiff's objections, the defendant's request was merely an attempt to give them further prominence, and did not warrant an exception because it was not allowed to be proved.

Exceptions overruled.

PHYSICAL EXAMINATION OF PARTIES is discussed in the monographic note to *Cleveland etc. Ry. Co. v. Huddleston*, 68 Am. St. Rep. 242-252. In an action for personal injuries, where the plaintiff tenders an issue as to his physical condition, the court has power to order him to submit to an examination of his person: *Wanek v. Winona*, 78 Minn. 98, 79 Am. St. Rep. 354, 80 N. W. 851.

FULLER v. FULLER.

[177 Mass. 184, 58 N. E. 588.]

DIVORCE — EVIDENCE — CONVERSATION BETWEEN HUSBAND AND WIFE.—In an action for divorce, a husband will not be permitted to testify as to a private conversation with his wife, in which she refuses to return to his home, where no one else was present, and there was no abuse, threat, or assault, under a statute prohibiting a husband or wife from testifying as to private conversations with each other.

EVIDENCE — CONVERSATION BETWEEN HUSBAND AND WIFE.—The fact that a conversation between a husband and wife accompanies and explains an act of hers is not sufficient to take it out of the rule that neither husband nor wife shall be allowed to testify as to private conversations with each other.

Two libels for divorce upon the ground of desertion. The wife left her husband's home and went to a hotel. He was permitted to testify, under objection, concerning a conversation he held with her in the hotel, in which he asked her to return home, and she replied that she would not go back and live with his family. Massachusetts Public Statutes, chapter 169, section 18, clause 1, provide that "neither husband nor wife shall be allowed to testify as to private conversations with each other."

F. B. Smith and F. F. Dresser, for Josephine E. M. Fuller.

H. Parker, for Dana L. Fuller.

¹⁸⁴ HAMMOND, J. The exception to the admission of the evidence of the husband as to the conversation between him and ¹⁸⁵ his wife at the hotel on the day she left his house must be sustained.

While it is true, as said in *French v. French*, 14 Gray, 186, 188, that the word "conversation" in the statute does not include all language between husband and wife, still it must be held to include the language in this case. Here there was no abuse, no threat, no assault. It was a plain case of a conversation between husband and wife, and even if, as contended by the counsel for the husband, it was a conversation which accompanied and explained the act of the wife in going to the hotel, and her mental attitude in that act, still it was within the prohibition of the statute. The fact that the conversation accompanies and explains the act is not sufficient to take it out of the operation of the rule: *Jacobs v. Hesler*, 113 Mass. 157. See,

further, as to the application of the statute, *Raynes v. Bennett*, 114 Mass. 424, 427; *Drew v. Tarbell*, 117 Mass. 90; *Commonwealth v. Cleary*, 152 Mass. 491, 25 N. E. 834; *Lyon v. Prouty*, 154 Mass. 488, 28 N. E. 908. In the latter case, where the nature of the conversation was much like that in the present case, the evidence was admitted on the ground that some one else was present.

It is contended, however, by the counsel for the husband that the exception at the trial was taken to the first question and answer only, and that there was nothing prejudicial to the wife in that answer. Assuming, without deciding, that this contention as to the scope of the exception is correct, we think the answer to the first question was of a nature prejudicial to the wife. It was not in dispute that the wife left the house of her husband and went to the hotel, but it was in dispute whether that was by the acquiescence of the husband, and whether she intended not to return. Whether she intended to return and whether her husband desired her return were very material facts. It is clear that upon those issues the statement of the husband that he asked his wife to return, when taken in connection with the undisputed fact that she did not return, might have a very important bearing prejudicial to the wife.

Since the exceptions to this evidence must be sustained, it is unnecessary to pass upon the other questions raised.

Exceptions sustained.

EVIDENCE.—A HUSBAND OR WIFE is generally considered incompetent to testify to conversations between themselves when alone, not only when one of them is a party, but in all cases: See the monographic note to *Commonwealth v. Sapp*, 29 Am. St. Rep. 413.

COPELAND v. BROCKTON STREET RAILWAY CO.

[177 Mass. 186, 58 N. E. 639.]

EVIDENCE—CONTRACT PRICE—MARKET VALUE.—In an action upon a contract to recover for goods sold, where there is a conflict in the evidence as to the price to be paid, evidence of the market value of such goods is admissible, if the jury are instructed that they should consider the evidence only as bearing on the question of probability as to what the contract was as to price.

Contract to recover for five hundred and thirty loads of sand.

F. M. Bixby, for the defendant.

W. Goddard, for the plaintiff.

¹⁸⁶ LATHROP, J. The only question in dispute between the parties was as to the price to be paid for five hundred and thirty loads of sand, sold by the plaintiff to the defendant. The plaintiff contended that the price agreed to be paid was fifteen cents a load, and the defendant that it was ten cents a load. There was evidence that such sand had a market value, and that both parties knew it. As bearing upon the probabilities of what the contract was as to price, the judge allowed the plaintiff to show what the fair market price was there at that time, and the defendant excepted. The jury were instructed that they should consider the evidence only as bearing on the question of probability, if it furnished any, of what the contract as to price was; and also that the plaintiff could not recover the fair market value, but only ten or fifteen cents a load.

¹⁸⁷ We have no doubt that the evidence was rightly admitted for the purpose to which it was limited: *Bradbury v. Dwight*, 3 Met. 31; *Upton v. Winchester*, 106 Mass. 330; *Nickerson v. Spindell*, 164 Mass. 25, 27, 41 N. E. 105. See, also, *Valley Lumber Co. v. Smith*, 71 Wis. 304, 5 Am. St. Rep. 216, 37 N. W. 412; *Swain v. Cheney*, 41 N. H. 232; *Moore v. Davis*, 49 N. H. 45, 6 Am. Rep. 460.

Exceptions overruled.

EVIDENCE OF THE VALUE OF PROPERTY at the time of its sale is admissible, where the testimony is conflicting as to the contract price agreed upon: *Valley Lumber Co. v. Smith*, 71 Wis. 304, 5 Am. St. Rep. 216, 37 N. W. 412.

BOSTON AND MAINE RAILROAD v. SULLIVAN.

[177 Mass. 230, 58 N. E. 689.]

INJUNCTION AGAINST CONTINUING TRESPASS.—If a defendant has been guilty of trespass upon the plaintiff's land which he intends to continue, no question of title or right of way being involved, a court having general equity powers may issue an injunction against the continuing of such trespasses.

EQUITY PLEADING—ALLEGATION OF INJURY TO PLAINTIFF.—A bill in equity which states all the facts necessary to give the court jurisdiction, damage to the plaintiff being the necessary result of the facts stated, is not demurrable upon the ground that it fails to set forth that the plaintiff has been injured.

Bill in equity to enjoin the defendants from going upon the station premises of the plaintiff company to solicit incoming passengers and their baggage; from interfering with the carrying out of a contract between the plaintiff and one Williams, under which contract Williams had the exclusive right to use the station premises to solicit trade from incoming passengers. A demurrer to the bill was sustained, and judgment was rendered for the defendants on the merits.

C. A. De Courcy, for the plaintiff.

J. P. Sweeney, for the defendants.

232 LATHROP, J. There can be no doubt that the defendants illegally trespassed upon the plaintiff's land, and this was practically conceded at the argument: *Old Colony R. R. Co. v. Tripp*, 147 Mass. 35, 9 Am. St. Rep. 661, 17 N. E. 89; *Boston etc. R. R. Co. v. Brown*, 177 Mass. 65, 58 N. E. 189.

The only question of importance, then, is whether the plaintiff should have resorted to an action at law, as was done in the two cases cited, or whether it is also entitled to maintain a bill in equity. The facts show that the defendants have been guilty of trespasses, which they propose to continue. The ownership of the plaintiff is admitted, and no question of title is involved. Nor is any claim to a right of way over the plaintiff's land set up in the answer of the defendants.

It seems to us clear that the bill in this case may be maintained. If the plaintiff were to sue at law, the amount recoverable could not be large in comparison with the amount expended in litigation, and every trespass would give a new right of action. Hence, there would arise a great multiplicity of suits. At some time the plaintiff would be entitled to the protection of a court of equity, and there is no reason why, on the facts of this case, the remedy by injunction should not be granted at once. This court has now full jurisdiction in equity and can put in force the remedies appropriate to that jurisdiction.

The language of Sir W. M. James, L. J., in the case of *Goodson v. Richardson*, L. R. 9 Ch. App. 221, 226, is very appropriate to this case: "The defendant in this case is admittedly a trespasser. He has committed a trespass upon the plaintiff's land without any legal justification or any legal excuse whatever; and he proposes to continue that trespass from day to day . . . for the purpose of making a profit of a trade which

he proposes to set up in rivalry to a trade which the owner of the land upon which he is so committing the trespass is interested in. It is said that we ought to allow this to be done; that we ought, in fact, to dismiss the plaintiff from this court, and tell him to find his way to ²³³ another court, in which he is to bring an action for the wrong for which there is no defense whatever. He is to bring that action at his own cost, and having succeeded in one action, he is to bring a second—I do not know whether more than one will be required—and then, having succeeded in one action, or two actions, or perhaps three actions, all of which, on the facts proved in this case, would necessarily result in verdicts for him, he is to come back to this court and obtain a perpetual injunction on the ground of repeated vexation and repeated actions. I do not think that there is any principle in this court which will compel us to drive the plaintiff to go through all that litigation before he is entitled to that relief which he would ultimately get when he had gone through it.”

In the same case it was said by Lord Chancellor Selborne: “I cannot look upon this case otherwise than as a deliberate and unlawful invasion by one man of another man’s land for the purpose of a continuing trespass, which is in law a series of trespasses from time to time, to the gain and profit of the trespasser, without the consent of the owner of the land; and it appears to me, as such, to be a proper subject for an injunction”: See, also, *Allen v. Martin*, L. R. 20 Eq. 462; *Lembeck v. Nye*, 47 Ohio St. 336, 21 Am. St. Rep. 828, 24 N. E. 686; *Warren Mills v. New Orleans Seed Co.*, 65 Miss. 391, 7 Am. St. Rep. 671, 4 South. 298; *United States etc. Emigration Co. v. Gallegos*, 89 Fed. 769, 773; *Canastota Knife Co. v. Newington Tramway Co.*, 69 Conn. 146, 161, 36 Atl. 1107; *Musselman v. Marquis*, 1 Bush, 463, 89 Am. Dec. 637; *Ellis v. Wren*, 84 Ky. 254, 1 S. W. 440; 3 *Pomeroy’s Equity Jurisprudence*, sec. 1357; 1 *Spelling on Extraordinary Relief*, sec. 342; 1 *Beach on Injunctions*, sec. 523.

The case at bar is distinguishable from *Washburn v. Miller*, 117 Mass. 376. There, a question arose as to the plaintiff’s right to the way in question, as against the defendant. Here, no question of title arises. There, the trespasses had been committed and were not continuing trespasses. Here, the trespasses are continuing. It is also to be noticed that that case was decided in 1875, when the General Statutes, chapter 113, were in force. Section 2 of that chapter, after setting forth

certain cases in which the court should have jurisdiction, and not mentioning trespasses, concluded as follows: "And shall have full equity jurisdiction, according to the usage and practice of courts of equity, in all other cases where there is not a plain, adequate, and complete remedy ²³⁴ at law." This clause was repealed by the statute of 1877, chapter 178, section 2, and a much broader law enacted. This gives to this court "jurisdiction in equity of all cases and matters of equity, cognizable under the general principles of equity jurisprudence"; and it is further declared: "And in respect of all such cases and matters, shall be a court of general equity jurisdiction": See Pub. Stats., c. 151, sec. 4.

The cases we have cited above and the text-writers show that a court having general equity powers may issue an injunction in a case like the present, where the trespasses are continuing. The fact that the defendant is solvent in such a case is not of importance, although his insolvency may be an additional reason for sustaining the jurisdiction.

The bill in this case sets forth all the facts necessary to give the court jurisdiction. Damage to the plaintiff is the necessary result of the facts set forth; and when that appears it is no ground of demurrer that the bill does not set forth that the plaintiff has been injured: 2 Beach on Injunctions, sec. 1397.

The only other defense relied upon is that the person with whom the plaintiff made the contract was not duly licensed in accordance with an ordinance of the city of Lawrence. Some question is made as to the validity of this ordinance, but we do not deem it necessary to consider this point, as we are of opinion that if the facts are as the defendants contend, they afford no excuse for their trespasses.

The result is that the demurrer should be overruled and an injunction issue.

So ordered.

INJUNCTION.—A CONTINUING TRESPASS may be enjoined: New York etc. R. R. Co. v. Scovill, 71 Conn. 136, 71 Am. St. Rep. 159, 41 Atl. 246.

BACON v. HOOKER.

[177 Mass. 335, 58 N. E. 1078.]

DEEDS—ALTERATION—EFFECT.—So far as a deed passes an estate and is not merely executory, its executed effect is not disturbed by a subsequent alteration.

CHATTEL MORTGAGE — ALTERATION — EFFECT.—The material alteration of a chattel mortgage by the mortgagee after its execution destroys the mortgage so far as it remains an executory instrument.

CHATTEL MORTGAGES — ALTERATION — RETAKING PROPERTY.—Where a mortgagee upon the breach of a condition is entitled to enter the mortgagor's premises and retake the goods, such license is executory and depends upon the continued operation of the mortgage. Therefore, if the mortgage becomes void by subsequent alteration, the mortgagee cannot enter the mortgagor's premises for the purpose of taking the mortgaged goods.

B. B. Dewing and S. R. Cutler, for the defendants.

P. B. Kiernan, for the plaintiff.

³³⁶ **HOLMES, C. J.** This is an action of tort with counts for a trespass upon the plaintiff's close, for a trespass to the plaintiff's person, and for the conversion of a piano. The defendants justified under a mortgage of chattels, including the piano, conditioned, ³³⁷ among other things, against moving the goods from the place where they were at the time, and proved a breach of the conditions. The plaintiff offered evidence that the defendants had added the description of various articles to the granting clause of the mortgage without the knowledge of herself or her husband. The jury were instructed that if the defendants had made a material alteration in the mortgage without the knowledge of the other parties, the mortgage was void and the defendants' servant had no right to take the piano, and that if in doing so he had used force to the person of the plaintiff, the defendants were liable. The jury found for the plaintiff, and the defendants come here on exceptions which we agree with the judge below were properly saved. Other exceptions were taken which are not argued, and which we therefore assume to be waived.

We must take it that the alteration was material, although it is fair to observe that the mortgage covered all the personal property in the plaintiff's house at the time of its execution, and that so far as appears the defendants may have written in the words because they rightly or wrongly supposed that the articles

enumerated were covered by the general language already there. The alteration was a cancellation of the deed, having the same effect that tearing off the seals would have had. This rule comes down to us from a time when the contract contained in a sealed instrument was bound so indissolubly to the substance of the document that the soul perished with the body when the latter was destroyed or changed in its identity for any cause. As applied to deeds the rule has an unimpeachable pedigree, and is elementary law.

However, in modern times, at least, it is settled that, so far as a deed passes an estate and is not merely executory, its executed effect is not disturbed by a subsequent alteration; and the question has been raised as to how this qualification will operate in the case of a mortgage: *Kendall v. Kendall*, 12 Allen, 92. In that case, the change consisted in the addition of the name of the mortgagor's wife to a mortgage of land, and the court remarked that it did not appear by whom the alteration was made, and that nothing was done which, if genuine, would have affected the interest of the mortgagor. The wife was dead. It was held that evidence of the change properly ³³⁸ was rejected in an action to foreclose brought against the husband. On the other hand, it was decided in *Harrison v. Owen*, 1 Atk. 520, West & H. Ch. 527, that if a mortgagee cancels a mortgage by tearing off the seals, it is as much a release as canceling a bond, although it does not revest the estate in the mortgagor. The same principle clearly would govern in case of alteration of both bond and mortgage by the mortgagee: *Waring v. Smyth*, 2 Barb. Ch. 119, 47 Am. Dec. 299. And it has been applied unanimously, so far as we know, in this country, where the alteration was in the mortgage alone, in the case of a mortgage of land, at least so far as rights under the mortgage were concerned: *McIntyre v. Velte*, 153 Pa. St. 350, 25 Atl. 739; *Marcy v. Dunlap*, 5 Lans. 365; *Powell v. Pearlstine*, 43 S. C. 403, 409, 21 S. E. 328; *Coles v. York*, 28 Minn. 464, 10 N. W. 775; *Pereau v. Frederick*, 17 Neb. 117, 22 N. W. 235; *Johnson v. Moore*, 33 Kan. 90, 5 Pac. 106; *Cutler v. Rose*, 35 Iowa, 456. See 1 Jones on Mortgages, 4th ed., secs. 94, 95; 2 Am. & Eng. Ency. of Law, 2d ed., 188, 189, sub. v. "Alteration of Instruments"; Fisher on Mortgages, 4th ed., 749; 2 Robbins on Mortgages, 1402. In *Hollingsworth v. Holbrook*, 80 Iowa, 151, 20 Am. St. Rep. 411, 45 N. W. 561, a case like the one at bar, it was held that after the

alteration the mortgagee could not justify taking possession of the property covered by it to foreclose.

But whether all the cases cited were decided rightly or not, and if we assume in favor of the defendant that he had a title in the chattels which became absolute at law upon breach of condition, still without aid from the deed as an executory instrument the defendants had no right to enter the plaintiff's premises for the purpose of taking the goods. That seems to be the result of *McLeod v. Jones*, 105 Mass. 403, 7 Am. Rep. 439. See *Smith v. Hale*, 158 Mass. 178, 183, 35 Am. St. Rep. 485, 33 N. E. 493; *Lambert v. Robinson*, 162 Mass. 34, 37, 44 Am. St. Rep. 326, 37 N. E. 753. In other words, in addition to title to the goods, the defendants must make out an irrevocable license to enter the plaintiff's close. The license is not an estate which was granted by the mortgage when the deed was executed; it is a mere permission, which does not operate until the time comes. Such a permission is executory, and depends upon the continued operation of the deed. It follows that the exceptions must be overruled, but we are far from thinking the case so free from difficulty that the plaintiff should have double costs.

Exceptions overruled.

THE ALTERATION OF AN INSTRUMENT, made without the consent of the party sought to be charged thereon, at any time after its execution by him, generally renders it void: See the monographic note to *Woodworth v. Bank of America*, 10 Am. Dec. 267-273. Yet a deed, valid when executed, passes title, which is not divested by a subsequent alteration: *Alabama etc. Land Co. v. Thompson*, 104 Ala. 570, 53 Am. St. Rep. 80, 16 South. 440.

NATIONAL BANK OF THE REPUBLIC v. DELANO.

[177 Mass. 362, 58 N. E. 1079.]

ATTORNEY AND CLIENT — COMMUNICATIONS — EVIDENCE.—A statement of a fact made by a client to his attorney in the course of the employment, concerning a matter about which he, as such attorney and in no other capacity, needed information, is a privileged communication, not admissible in evidence, even though at the time it was made it was not made for the express purpose of taking advice.

Petition to revise an order of the court of insolvency for Middlesex county, expunging a claim of the National Bank of the Republic against the insolvent estate of the firm of George S. Delano and Cadmus R. Delano, copartners.

C. H. Sprague, for the petitioner.

H. W. Ogden and J. B. Crawford, for the respondents.

³⁶³ HAMMOND, J. At the trial in this court before the chief justice, the question was whether the notes executed by George S. Delano, in the name of George S. Delano & Son, after the formation of the firm, and received by the petitioner as renewals of the individual notes of the said George, which had been discounted by the petitioner before the formation of the firm, were provable against the firm in the court of insolvency. The decision ³⁶⁴ of this question finally turned upon whether these renewals were made with the knowledge and consent of Cadmus, the other partner.

At the hearing it appeared that George employed one Emmons, an attorney at law, to act as such attorney "to put the firm through insolvency," and gave him a list of the creditors. Emmons made out in proper form a list of the liabilities, including the notes in controversy. Cadmus, at the request of George, went to the office of Emmons, and there the contents of the schedule and the fact that these notes were included therein were made known to him, and he then signed the schedules and swore to their accuracy before Emmons as justice of the peace.

As tending to show that the renewals were made with the knowledge and consent of Cadmus, the petitioner offered to show by Emmons that Cadmus then said to Emmons that the firm assumed the liabilities of the business existing at the time the firm was formed, including the notes then held by the petitioner, and further, that this communication was not made for the purpose of obtaining advice. The court found that Emmons at that time was counsel for Cadmus, and, having so found, excluded the evidence. The only question before us is whether the evidence was admissible.

The petitioner, admitting the general rule that, where an attorney is professionally employed by a client, all communications between them in the course and for the purpose of that employment are so far privileged that the legal adviser, when called as a witness, cannot be permitted to disclose them (Taylor on Evidence, 9th ed., sec. 911), contends that "it is impossible to conceive how the information conveyed by the communication could have been presumed to be of any consequence in connection with the matter in hand," especially when taken in connection with the offer to show that it was not made for the

purpose of taking advice. This contention does not seem to us tenable. The insolvency of an ordinary partnership imports the insolvency of every partner, and the proceedings in insolvency in such a case may involve the marshaling of the assets and claims as between the creditors of the firm and the individual creditors of each partner. Whether the notes in dispute were provable against the firm, or only against the individual estate of George, was a matter with which ³⁶⁵ Emmons in the course of his professional duty was likely to have occasion to deal, both as counsel for the firm and as counsel for Cadmus. He needed to be informed about it, and the communication made by Cadmus was in the strict line of the information needed. Indeed, it is difficult to see how the attorney could have been in a situation to do his duty properly without some information on this point. It is a plain case of a communication from a client to an attorney, while such attorney, and employed to continue to act as such in a matter running into the future. The communication was of a fact about which he, as such attorney and in no other capacity, needed information. It was made to him in the course of his employment. It matters not that at that time it was not made for the express purpose of taking advice. It is enough if it was a statement of a fact made in the course of the employment and was material thereto, or believed to be such, and was made by the client to his attorney in recognition and because of the professional relation between them. The case is clearly distinguishable from *Hutton v. Robinson*, 14 Pick. 416, 25 Am. Dec. 415, and similar cases upon which the petitioner relies.

Exceptions overruled.

ATTORNEY AND CLIENT.—PRIVILEGED COMMUNICATIONS between attorney and client are discussed in the monographic note to *O'Brien v. Spalding*, 66 Am. St. Rep. 213-243.

DICKINSON v. WEST END STREET RAILWAY CO.

[177 Mass. 365, 59 N. E. 60.]

RAILROADS — FELLOW-SERVANTS—EMPLOYEE RIDING FREE.—An employé of a street railway company, who is riding free on the platform of a street-car under a rule of the company allowing him so to ride, and who at the time does not stand in the relation of a servant to the company, his time being his own, and he owing the company no duties until the time arrived for resuming his work, is not a fellow-servant of the motorman who operates the car.

Tort for personal injuries sustained through the negligence of the defendant's servants. The trial court ruled that the plaintiff was not a passenger, but was a fellow-servant, and directed a verdict for the defendant.

H. M. Hutchings, J. H. Beale, Jr., and W. D. Turner, for the plaintiff.

P. H. Cooney and A. I. Peckham, for the defendant.

367 KNOWLTON, J. The question in this case is whether the plaintiff was on the defendant's car as a passenger at the time of the accident, or whether he was at that moment in the service of the defendant, in such a sense that the negligent motorman was his fellow-servant.

The defendant had made a rule "permitting policemen, firemen, advertising agents, news agents, and employés of the defendant company in uniform to ride free at any time, such persons being required to ride upon the front platform so far as practicable." At the time of the accident the plaintiff was riding on the front platform under this rule, wearing his uniform. Persons riding gratuitously under this rule are passengers, as well as those who pay their fare: *Todd v. Old Colony etc. R. R. Co.*, 3 Allen, 18, 80 Am. Dec. 49; *Doyle v. Fitchburg R. R. Co.*, 162 Mass. 66, 44 Am. St. Rep. 335, 37 N. E. 770; *Steamboat New World v. King*, 16 How. 469; *State v. Western Maryland R. R. Co.*, 63 Md. 433. All members of the classes included in the rule stand alike in reference to the duty of care which the defendant owes them, whether they come within one part of the description or another. The rule in reference to employés permits them to ride at any time and place, and for any purpose, if they are in uniform. The reasons in each case for extending this privilege to members of these different

classes are not material. Probably they are different in reference to different classes, but they are such as the defendant deems sufficient. So far as employés are concerned, it is enough that except possibly in regard to wearing uniform, they are given the same rights as others who have no direct connection with the defendant by employment or otherwise.

The question then is, whether at the time of the accident the plaintiff was riding in the full exercise of the rights given by this rule, or whether he was on the car in the performance of his duties as a servant of the defendant, so as to make him at that moment a fellow-servant of the motorman. The bill of exceptions answers this question in its statement as follows: His work for the defendant "consisted of a certain number of trips at fixed and regular times each day; at the ³⁶⁸ time of the accident, he was not on actual duty, but at about noon had finished his work of that morning, got on the first car that came along and was going home to dinner; that he took no part in the management of this car; that he usually had about three hours, between 12 and 3 o'clock, during which he was not on actual duty, and his time was his own; and he usually returned home about noon to dinner." The car on which he was riding was not on the line on which he was employed.

At the time of the accident he did not stand in the relation of a servant to the defendant. His time was his own, and he owed the defendant no duties until the time arrived for resuming his work. It was no part of his duty to the defendant, as a servant, to take the car on which he was riding and go to a particular place for his dinner. He might go where he pleased and when he pleased during the interval before coming back to his work. This case is different in this particular from cases in which the plaintiff was riding in the line of his duty in the course of his employment: *Gillshannon v. Stony Brook R. R. Co.*, 10 Cush. 228; *O'Brien v. Boston etc. R. R. Co.*, 138 Mass. 387, 52 Am. Rep. 279; *McGuirk v. Shattuck*, 160 Mass. 45, 39 Am. St. Rep. 454, 35 N. E. 110; *Manville v. Cleveland etc. R. R. Co.*, 11 Ohio St. 417; *McNulty v. Pennsylvania R. R. Co.*, 182 Pa. St. 479, 61 Am. St. Rep. 721, 38 Atl. 524. His rights were the same as if, after finishing his day's services, he had taken a car in the evening to visit a friend, or to do any business of his own. The fact that he had been in the defendant's service during the day would not make him a fellow-servant with the motorman while riding in the evening

under the rule, any more than if he had been a policeman or a newsdealer. The case comes within the decision in *Doyle v. Fitchburg R. R. Co.*, 162 Mass. 66, 44 Am. St. Rep. 335, 37 N. E. 770. For other cases of similar purport see *Baltimore etc. R. R. Co. v. State*, 33 Md. 542; *State v. Western Maryland R. R. Co.*, 63 Md. 433; *Baird v. Pettit*, 70 Pa. St. 477, 483; *McNulty v. Pennsylvania R. R. Co.*, 182 Pa. St. 479, 61 Am. St. Rep. 721, 38 Atl. 524; *Packet Co. v. McCue*, 17 Wall. 508; *Morier v. St. Paul etc. Ry. Co.*, 31 Minn. 351, 47 Am. Rep. 793, 17 N. W. 952; *Manville v. Cleveland etc. R. R. Co.*, 11 Ohio St. 417.

Exceptions sustained.

PASSENGERS.—AN EMPLOYE OF A RAILROAD company, who is given free transportation to and from his work, is a passenger while thus being transported, to whom the company is liable for the negligence of another of its employes: *McNulty v. Pennsylvania R. R. Co.*, 182 Pa. St. 479, 61 Am. St. Rep. 721, 38 Atl. 524; *Doyle v. Fitchburg R. R. Co.*, 162 Mass. 66, 44 Am. St. Rep. 335, 37 N. E. 770. Compare *Jonnone v. New York etc. R. R. Co.*, 21 R. I. 452, 79 Am. St. Rep. 812, 44 Atl. 592.

DEDHAM NATIONAL BANK v. EVERETT NATIONAL BANK.

[177 Mass. 392, 59 N. E. 62.]

BANKS — FORGED CHECKS — PAYMENT OF—RECOVERY.—A drawee bank paying a forged check or draft to a bona fide purchaser cannot recover back the money paid.

BANKS—PAYING FORGED CHECK.—When the holder of a check in no way contributes to the deception that the signature is genuine, the drawee bank takes the risk of paying, so far as the signature is concerned.

The plaintiff asked the judge to rule: "1. That if the defendant's conduct led the plaintiff to pay these checks, and that they are forgeries, the plaintiff can recover unless there was an unreasonable delay in detecting the forgeries and that the defendant was injured thereby; 2. That on all the evidence the court would not be warranted in finding that the defendant has suffered any loss through any lack of due diligence on the plaintiff's part in discovering the forgeries; 3. If the checks were forgeries, and the defendant had not paid on account of them, before the plaintiff notified it of the forgeries, more than one hundred and fifty dollars, the plaintiff can recover the

balance paid by it to the defendant on account of them, namely, two hundred dollars, in any event; 4. On all the evidence the plaintiff has exercised due diligence in discovering the forgeries; 5. On all the evidence, if the checks are forgeries, the plaintiff is entitled to recover." The judge refused, and ordered judgment for defendant.

E. F. McClennen, for the plaintiff.

W. I. Badger and S. Robinson, for the defendant.

³⁹⁴ HOLMES, C. J. This is an action to recover the amount of two forged checks on the plaintiff bank paid by it to the defendant. Both checks were drawn payable to cash and were without indorsement. Both were presented for deposit to the account of Fenno, a depositor in the defendant bank, by the depositor's clerk, who is found to have been the forger, the first on July 31st, the second on September 4, 1897. At the time of depositing the first, which was for one hundred and fifty dollars, the clerk asked for and received fifty dollars cash, for Fenno, as he said, and on depositing the second, which was for two hundred dollars, he got one hundred dollars in the same way. The residue of the two checks was credited by the defendant to Fenno on his account. Fenno afterward overdraw his account, but subsequently made the overdraft good, and his deposit has exceeded the amount of the credit on these checks since the defendant was notified of the forgery. Both checks were paid by the plaintiff through the clearing-house, and it is found that if the plaintiff's servant who paid them had compared the signatures on the checks with a genuine signature of the supposed maker which it had on file, he would have discovered the forgery. Owing to an ³⁹⁵ examination of Fenno's deposit the defendant was led to inquire by telephone shortly after the second check was paid whether the signatures were genuine, and was answered that they were all right. The plaintiff did not demand repayment until February 25, 1898. The judge found and ordered judgment for the defendant. The plaintiff asked rulings in favor of its right to recover either the whole amount or all but the sums actually paid out to the clerk, and the case is here on exceptions to the refusal to give them.

The plaintiff's argument is directed to proving that we should not adopt the rule laid down in *Price v. Neal*, 3 Burr. 1354, according to which a drawee paying a forged draft or check to

a bona fide purchaser cannot recover back the money paid. We are aware that this rule has been questioned by some text-writers. But it is of such universal or nearly universal acceptance that we shall go into no extended discussion: *Gloucester Bank v. Salem Bank*, 17 Mass. 33, 42, 43; *National Bank of North America v. Bangs*, 106 Mass. 441, 444, 8 Am. Rep. 349; *Welch v. Goodwin*, 123 Mass. 71, 77, 25 Am. Rep. 24; *First National Bank of Danvers v. First National Bank of Salem*, 151 Mass. 280, 283, 21 Am. St. Rep. 450, 24 N. E. 44; *Bank of United States v. Bank of Georgia*, 10 Wheat. 333, 348; 2 *Daniel on Negotiable Instruments*, 3d ed., secs. 1359-1361.

Probably the rule was adopted from an impression of convenience rather than for any more academic reason; or perhaps we may say that Lord Mansfield took the case out of the doctrine as to payments under a mistake of fact by the assumption that a holder who simply presents negotiable paper for payment makes no representation as to the signature, and that the drawee pays at his peril: See *Wilkinson v. Johnson*, 3 Barn. & C. 428, 436; *Bernheimer v. Marshall*, 2 Minn. 78, 84, 72 Am. Dec. 79; *Bank of St. Albans v. Farmers' etc. Bank*, 10 Vt. 141, 145, 146, 33 Am. Dec. 188; *Ellis v. Ohio Life Ins. etc. Co.*, 4 Ohio St. 628, 662, 64 Am. Dec. 610.

The ground of a recovery for a payment under a mistake of fact is that the existence of the fact supposed was the conventional basis or tacit condition of the transaction. If parties are so far at arm's length that each takes the risk of what he does, of course one of them cannot recover money paid because he finds that he has made a mistake. We believe that, now at least, especially in the case of a bank, it is a matter of general understanding ³⁹⁶ that, when the holder of a check in no way contributes to the deception, the bank does take the risk of paying, so far as the signature is concerned. But if this is so, mistake disappears as a ground for recovery, and there is no other. It is vain to point out that in other cases more or less analogous there is an implied representation, e. g., *Boston etc. R. R. Co. v. Richardson*, 135 Mass. 473. The grounds for difference in understanding may be very nice, but even if the decisions had originated the difference without adequate ground, when once it exists its existence is a sufficient reason for continuing to decide in accordance with it.

The plaintiff attempts to make out that the defendant led the plaintiff to make the payment by requiring no indorsement of

the checks, on the ground that its officer was led by that fact to suppose that they were cashed for the man who appeared to have been their maker. The attempt to prove a custom that would justify such an inference failed, and the judge may not have believed even that the officer was influenced in his conduct by the absence of an indorsement. But if he was, the evidence did not show any duty on the part of the defendant to anticipate such a result.

The indorsement of the check by the defendant was not an indorsement by the payee. It was not an indorsement for purposes of transfer, and contained no representations beyond what would have been imported by a presentment in person: *National Bank of North America v. Bangs*, 106 Mass. 441, 444, 8 Am. Rep. 349.

In view of the ground on which we put the case, it does not seem to be necessary to consider further objections to the plaintiff's recovery, or to examine more precisely the position of the defendant as a purchaser for value: *Fox v. Bank of Kansas City*, 30 Kan. 441, 1 Pac. 789; *Market Bank v. Hartshorne*, 3 Abb. Dec. 173.

Judgment affirmed.

PAYMENT OF FORGED CHECK.—A banker upon whom a forged check has been drawn cannot recover the amount from a bona fide holder to whom he has paid it: *Germania Bank v. Boutell*, 60 Minn. 189, 51 Am. St. Rep. 519, 62 N. W. 327. Compare *Metropolitan Nat. Bank v. Merchants' Nat. Bank*, 182 Ill. 367, 74 Am. St. Rep. 180, 55 N. E. 360; *Land etc. Co. v. Northwestern Nat. Bank*, 196 Pa. St. 230, 79 Am. St. Rep. 717, 46 Atl. 420.

MORAN v. DUNPHY.

[177 Mass. 485, 59 N. E. 125.]

TORT—PLEADING—MALICIOUSLY INDUCING EMPLOYER TO DISCHARGE EMPLOYÉ.—In an action for maliciously inducing another to discharge his employé, the complaint should set out the substance of the false statements by which the defendant is alleged to have induced such discharge.

TORT.—TO INDUCE A THIRD PERSON, MALICIOUSLY AND WITHOUT JUSTIFIABLE CAUSE, to end his employment of another, whether the inducement be by false slanders or successful persuasion, is an actionable tort.

Tort for maliciously inducing one Cowan to discharge the plaintiff from his employ. The first count of the declaration

alleged that the plaintiff was in the employ of Cowan, and that the defendant, with intent to injure him and to induce Cowan to discharge him, "did maliciously, willfully, and wrongfully, by certain slanderous charges made by the defendant to said Cowan against his character, which were false and untrue, and which the defendant well knew to be false and untrue," induce Cowan to discharge him, and that Cowan did discharge him at the defendant's inducement. The second count alleged the employment, and that the defendant, with the intent to injure him and to induce Cowan to discharge him, "did maliciously, willfully, and wrongfully induce and instigate the said Cowan to discharge and dismiss him," and that Cowan did discharge him at the defendant's inducement. A demurrer to the declaration was sustained.

J. H. Hickey, for the plaintiff.

C. F. Eldredge, for the defendant.

⁴⁸⁶ HOLMES, C. J. The first count of the declaration in this case substantially follows the form held bad in *May v. Wood*, 172 Mass. 11, 51 N. E. 191, and *Rice v. Albee*, 164 Mass. 88, 41 N. E. 122, and the plaintiff's argument is directed to getting those cases overruled. It appears in the reports that the later decision did not command the assent of all of us, and it is quite possible at least that if the question came up now for the first time the majority might be found to be on the side which did not prevail: *Van Horn v. Van Horn*, 56 N. J. L. 318, 319, 28 Atl. 669. But it is not desirable that decisions should oscillate with changes in the bench, and we accept what was decided as the law. Still we deem it proper to call attention to the fact that the cases cited go only to a point of pleading. What they decide, so far as they bear on the present case, is merely that the substance of false statements by which a defendant is alleged to have induced a third person to break or ⁴⁸⁷ and his contract must be set out. That we accept. But in view of the series of decisions by this court from *Walker v. Cronin*, 107 Mass. 555, through *Morassee v. Brochu*, 151 Mass. 567, 21 Am. St. Rep. 471, 25 N. E. 74, *Tasker v. Stanley*, 153 Mass. 148, 26 N. E. 417, *Vegelahn v. Guntner*, 167 Mass. 92, 57 Am. St. Rep. 443, 44 N. E. 1077, *Harnett v. Plumbers' Supply Assn.*, 169 Mass. 229, 47 N. E. 1002, and *Weston v. Barnicoat*, 175 Mass. 454, 56 N. E. 619, to *Plant v. Woods*, 176 Mass. 492, 79 Am. St. Rep. 330, 57 N. E. 1011, we cannot

admit a doubt that maliciously and without justifiable cause to induce a third person to end his employment of the plaintiff, whether the inducement be false slanders or successful persuasion, is an actionable tort: See, also, *Angle v. Chicago etc. Ry. Co.*, 151 U. S. 1, 13, 14 Sup. Ct. Rep. 240.

We apprehend that there no longer is any difficulty in recognizing that a right to be protected from malicious interference may be incident to a right arising out of a contract, although a contract, so far as performance is concerned, imposes a duty only on the promisor. Again, in the case of a contract of employment, even when the employment is at will, the fact that the employer is free from liability for discharging the plaintiff does not carry with it immunity to the defendant who has controlled the employer's action to the plaintiff's harm. The notion that the employer's immunity must be a nonconductor so far as any remoter liability was concerned, troubled some of the judges in *Allen v. Flood*, [1898] App. Cas. 1, but is disposed of for this commonwealth by the cases cited: See, also, *May v. Wood*, 172 Mass. 11, 14, 15, 51 N. E. 191. So, again, it may be taken to be settled by *Plant v. Woods*, 176 Mass. 492, 501, 502, 79 Am. St. Rep. 330, 57 N. E. 1011, that motives may determine the question of liability; that while intentional interference of the kind supposed may be privileged if for certain purposes, yet if due only to malevolence it must be answered for. On that point the judges were of one mind: See *Plant v. Woods*, 176 Mass. 504, 79 Am. St. Rep. 341, 57 N. E. 1011. Finally, we see no sound distinction between persuading by malevolent advice and accomplishing the same result by falsehood or putting in fear. In all these cases the employer is controlled through motives created by the defendant for the unprivileged purpose. It appears to us not to matter which motive is relied upon. If accomplishing the end by one of them is a wrong to the plaintiff, accomplishing it by either of the others must be equally a wrong.

It follows from what we have said that we are of opinion that both counts of the declaration disclose a good cause of action, ⁴⁸⁸ although the first on the authority of *May v. Wood*, 172 Mass. 14, 51 N. E. 191, must be held insufficient in point of form. The second is not within the authority or reason of that case, and is in a form similar to the third count which was held good in *Walker v. Cronin*, 107 Mass. 555: See *Lumley v. Gye*, 2 El. & B. 216. As to that the demurrer will be overruled. Assuming that the demurrer was intended to be a demurrer

to each count as well as to the declaration, it will be sustained as to the first count, but it seems to us that under the circumstances the plaintiff should be given an opportunity to amend.

Demurrer to first count sustained; demurrer to second count overruled.

PROCURING DISCHARGE OF SERVANT.—AN ACTION may be maintained by an employe against a third person who maliciously procures his discharge: *Notes to Webber v. Barry*, 11 Am. St. Rep. 478; *Perkins v. Pendleton*, 60 Am. St. Rep. 260.

NATIONAL BANK OF SOUTH READING v. SAWYER.

[177 Mass. 490, 59 N. E. 78.]

BANKRUPTCY—PROVING NOTE AGAINST ESTATE OF BANKRUPT MAKER—LIABILITY OF INDORSER.—The omission on the part of the holder of an indorsed promissory note either to prove the note against the estate of the bankrupt maker, or to tender it to the indorser to enable him to make proof, does not release the indorser from liability.

BANKRUPTCY—RIGHT OF SURETY.—Equity will not compel a creditor to prove his claim in bankruptcy against his principal debtor for the benefit of a surety, unless the surety himself moves in the matter and requires the creditor to act, furnishing him with suitable indemnity against the consequences of risk and delay, and against expense.

Contract on a promissory note. Judgment for the plaintiff.

T. J. Barry and H. J. Jaquith, for Reynolds.

R. M. Morse and W. M. Richardson, for the plaintiff.

⁴⁹¹ **BARKER, J.** The only question argued is as to the effect of the bankruptcy act upon Reynolds' liability as indorser, the plaintiff not having proved the note against the estate of the maker in bankruptcy, and the maker having obtained a discharge.

The act provides that: "Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part, he shall be subrogated to that extent to the rights of the creditor": U. S. Stats. 1898, ⁴⁹² sec. 57, cl. i. Also that: "Whenever a claim is founded upon an

instrument in writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim": U. S. Stats. 1898, sec. 57, cl. b.

The contention is that the holder of an indorsed note who does not himself prove it must tender it to the indorser, to give him the opportunity to file it as required by clause b in his proof under clause i, and that if the holder does not make such tender, his omission releases the indorser.

Such a result would be most surprising under a statute one of whose provisions is that "the liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt": U. S. Stats. 1898, sec. 16. It is also to be noted that it does not appear from the agreed facts that there were in this instance any assets of the bankrupt estate, or any dividend, or that proof by the maker would have been of any benefit to the indorser. Aside from these considerations, and also aside from the further question how much the liability of an indorser, being founded upon his own independent contract and not being a joint obligation with that of the maker, differs from that of a strict surety, we are of opinion that the holder has no such active duty either to prove the note, of his own motion, or to tender it to the indorser to enable the latter to make proof, as to make such an omission on the part of the holder a release of the indorser. Even equity will not compel a creditor to prove in bankruptcy against his principal debtor for the benefit of a surety, unless the surety himself moves in the matter and requires the creditor to act, furnishing him with suitable indemnity against the consequences of risk and delay, and against expense: *Watertown Ins. Co. v. Simmons*, 131 Mass. 85, 41 Am. Rep. 196, and cases cited; *Wright v. Simpson*, 6 Ves. 714, 734; *Ex parte Rushforth*, 10 Ves. 409, 414; *Mayhew v. Crickett*, 2 Swanst. 185, 191; *Story's Equity Jurisprudence*, sec. 639. See *Bellows v. Lovell*, 5 Pick. 307, 311. The plaintiff was entitled to the possession of the note until it should be paid. Reynolds could pay it in performance of his promise as indorser, be reinstated in his original title, and then prove his own claim in bankruptcy without help. He made no payment, nor did he request the plaintiff either to prove the note or to allow it to be filed in support of any attempted proof. 493 Whether, if he had requested the plaintiff to prove the note, tendering the expenses of such proof with proper indemnity, or had himself attempted to prove his own claim, requesting the

plaintiff under proper indemnity to allow the filing of the note in support of such proof, he would have been released by a refusal on the part of the plaintiff, it is not necessary to consider, and upon those points we express no opinion.

The plaintiff not having been requested either to prove the note, or to allow it to be filed in support of any proof offered by Reynolds, the latter is liable upon his indorsement.

Exceptions overruled.

SURETYSHIP.—It is the business of a surety to see that his principal performs the duty which he has guaranteed, and not that of the creditor. Mere inaction of the creditor will not discharge the surety: *Watertown Fire Ins. Co. v. Simmons*, 131 Mass. 85, 41 Am. Rep. 196.

MILLARD v. BRAYTON.

[177 Mass. 533, 59 N. E. 436.]

LIFE INSURANCE—PLACE OF CONTRACT.—Where an application for a life insurance policy in favor of a named beneficiary is made in one state to the duly authorized agent of the company located there, who forwards it to the home office in another state, where it is accepted, but the policy returned contains additional beneficiaries, and was not to be delivered until the first premium was paid, the contract of insurance was not made until the policy as changed was delivered to the applicant and the premiums paid, and it is deemed a contract made in the former state, and the rights of the parties are to be determined by the law of such state.

LIFE INSURANCE—CONTRACT WITH WIFE ON HUSBAND'S LIFE.—Where a wife, having an insurable interest in the life of her husband, makes application to insure such interest, and upon such application a policy is issued insuring that interest, and not the husband's interest, in his own life, and the promise to pay, although not made in express terms to the wife, was in law a promise to her, the contract of insurance is in law between her and the company, notwithstanding her husband caused the application to be made and paid all the premiums.

LIFE INSURANCE—CONTRACT WITH WIFE—INTEREST OF CHILDREN.—Where a wife insures her interest in the life of her husband for her own benefit if she survives him, otherwise for the benefit of her children, the children, upon her death during the life of her husband, take a vested interest in such insurance policy, which survives to their legal representatives as against the representatives of the husband.

ESTATE OF DECEDENT—LEGAL REPRESENTATIVES. A PROMISE TO PAY MONEY at a time in the future sure to arrive inures to the benefit of the legal representatives of the person to whom the money is to be paid, if he is not alive at the time the payment is due.

Action on contract brought by the administrator of Isabelle S. Millard, daughter of Shubael W. Brayton, to recover from the executrix of said Shubael a portion of a sum of money paid to her by the Mutual Life Insurance Company. The trial judge found for the plaintiff.

C. E. Burke and H. L. Dawes, Jr., for the defendant.

A. Potter, for the plaintiff.

536 HAMMOND, J. In 1868 the Mutual Life Insurance Company of New York issued a policy upon the life of Shubael W. Brayton, then a resident of North Adams, in this state, in the sum of ten thousand dollars, "for the sole use of his said wife," Sarah M. Brayton, the money to be paid to her if living at the death of her husband, "and if not living, to her children, or their guardian, for their use." She died in 1877, leaving her husband and three children surviving. Of these children, William, never having married, died in 1881, a minor. Harriott died in 1888, leaving a husband but no children surviving. Isabelle in 1876 married the plaintiff, and in 1894 died, leaving him but no children surviving. Shubael W. Brayton died in 1897, leaving the defendant, his second wife, surviving, and she is his executrix and sole legatee.

In 1890, by an agreement between Mr. Brayton and the company, the policy was "continued as and for a paid-up policy" for six thousand two hundred and seventeen dollars, no further premiums to be required, "except in cases where an extra premium would be chargeable"; and after his death the insurance money was paid to the defendant, the plaintiff joining in a release to the company. In this action the plaintiff, as the administrator of the estate of the daughter of Isabelle, seeks to recover one-third of this money.

The first question is whether the rights of the parties to this action are to be determined by the law of New York or of this state.

At the time of the application, and continuously thereafter, Mr. Brayton and his wife were residents of this state. The **537** application was made in this state to the duly authorized agent of the company in this state, who forwarded it to the home office in the city of New York, where it was accepted, and the policy was sent by the company to its agent in this state and by him here delivered. It does not appear that any notice was given of the acceptance until the policy was delivered in this

state. In the application the beneficiary was the wife alone, while in the policy as sent by the company she was not the only beneficiary. The policy was not to be delivered until the first premium was paid. The contract was not made until the policy as changed was delivered to Mr. Brayton and the premium paid. The case is clearly distinguishable from *Commonwealth Ins. Co. v. Knabe etc. Mfg. Co.*, 171 Mass. 265, 50 N. E. 516, upon which the plaintiff relies. The contract was made in this state, and the rights of the parties, so far as involved in this suit, must be settled by the law of this state, notwithstanding the stipulation in the policy that the premiums and the sum insured were to be paid in the state of New York: *Thwing v. Great Western Ins. Co.*, 111 Mass. 93, 109; *Markey v. Mutual Benefit Ins. Co.*, 126 Mass. 158; *Equitable Assurance Soc. v. Clements*, 140 U. S. 226, 11 Sup. Ct. Rep. 822. See, also, *Mutual Ins. Co. v. Phinney*, 178 U. S. 327, 20 Sup. Ct. Rep. 906; *Hamlyn v. Talisker Distillery*, [1894] App. Cas. 202; *Jacobs v. Crédit Lyonnais*, 12 Q. B. Div. 589; *Mutual Ins. Co. of New York v. Cohen*, 179 U. S. 262, 21 Sup. Ct. Rep. 106.

The next question is whether, the beneficiaries named in the policy having died before the termination of the life insured, the proceeds of the policy go to the estate of Mr. Brayton as a resulting trust.

In the determination of this question it is necessary to ascertain whether the contract with the company was that of the wife or the husband. As the application is made a part of the contract its statements are to be regarded as material on that question. It is apparent from the most cursory examination of the application that many of the questions therein are propounded directly to the person whose life is to be insured and are expected to be answered by him, and not by the applicant, while others are propounded directly to the applicant, and are expected to be answered by her and not by the person whose life is to be insured. But whether the questions are propounded to the one or the other, both affirm and declare that all the answers are true and correct.

538 This application upon its face plainly distinguishes between the applicant and the person whose life is to be insured, or between the wife and the husband. The answer to the eighteenth question is that Sarah M. Brayton, the wife, is the person for whose benefit the assurance is to be effected. Then follows the statement that "it is hereby affirmed and declared by

Sarah M. Brayton, the applicant above named, and also by the person whose life is proposed for assurance," that the answers are correct. Further on it is declared "that the above-named applicant has an interest in the life of the said person whose life is proposed for insurance to the full extent of the amount of insurance above applied for."

It is also expressly stipulated and agreed that the application and declaration shall form the basis of the contract "between the above-named persons" and the insurer, "and the said person whose life is proposed for insurance" makes further declarations not here material.

The application has two signatures; the first is "Sarah M. Brayton, by S. W. Brayton," who signs as "the applicant or the person for whose benefit the assurance is applied for"; and the second is Shubael W. Brayton, who signs as "the person whose life is proposed for assurance." Throughout the whole document, including the signatures, the wife is described as the applicant, and the husband appears simply as the person whose life is to be assured.

Turning to the policy we find the same distinction sharply drawn. The insurer, "in consideration of the representations made in the application," and of a certain sum "paid by Sarah M. Brayton, wife of Shubael W. Brayton," and of other payments to be made, assures "the life of the said Shubael W. Brayton for the sole use of his said wife in the amount of ten thousand dollars for the term of his natural life." And the insurer agrees to pay the said amount "to the said assured for her sole use, if living, and if not living, to her children, or their guardian, for their use," in sixty days after due notice and proof of loss. It is further provided that this policy "is issued and accepted by the assured" upon certain conditions concerning the acts or conduct of "the said person whose life is hereby insured."

539 It is true that the promise to pay is not made in express terms to the wife, but it is made in consideration of money recited to have been paid by her, is a promise to pay the wife, and the policy recites that it is accepted by the assured—that is, the wife—upon certain conditions therein expressed.

The only proper conclusion is that the promise is made to the one who applies for it, who is acknowledged by the promisor to be the person who pays for it, and who receives and accepts it upon the conditions upon which it is made, and especially is this so as against the claim made by the estate of the husband

who did not apply for it, who is not the person recognized by the promisor as paying for it or as the person who is expected to accept it. It appears, therefore, from the application and policy constituting together the contract, that the wife, having an insurable interest in the life of her husband to the amount of ten thousand dollars, wished to insure that interest, and applied to the company for such insurance; that upon such application the policy was issued; that the basis of the contract or the thing insured was the interest of the wife in the life of her husband as stated in the application, and not the interest of the husband in his own life; that the consideration for the contract was recognized by all parties as coming from the wife; that the promise by the insurance company, although not made in express terms to the wife, was by fair and reasonable implication and in law a promise to the wife; that it was a promise to pay the wife, was made upon certain express conditions which were to be accepted by the assured, namely, the wife, and by no one else. It follows as a necessary consequence that the contract was in law between the company and the wife. It was a contract by which she was insured upon her interest in the life of her husband, and not a contract by which he was insured upon his interest in his own life.

In *Whitehead v. New York Ins. Co.*, 102 N. Y. 143, 150, 55 Am. Rep. 787, 6 N. E. 267, where each of three policies on the life of the husband recited that the consideration was paid by the wife and the money was to be paid to her, the court said: These contracts "purport on their face to be contracts with the wife as the party assured, and not at all with the husband, who stands in the policies as simply the life insured, his conduct and death furnishing the contingencies ⁵⁴⁰ upon which the liabilities of the insurer are made to depend. As the relation was tersely described on the argument, the contract is about the husband, but not with him."

In *Central Bank of Washington v. Hume*, 128 U. S. 195, 9 Sup. Ct. Rep. 41, a similar decision was made upon a similar contract: See, also, *Brown's Appeal*, 125 Pa. St. 303, 11 Am. St. Rep. 900, 17 Atl. 419; *Continental Ins. Co. v. Palmer*, 42 Conn. 60, 19 Am. Rep. 530; *Connecticut Ins. Co. v. Burroughs*, 34 Conn. 305, 91 Am. Dec. 725; *Phoenix Ins. Co. v. Dunham*, 46 Conn. 79, 33 Am. Rep. 14; *Cyrenius v. Mutual Ins. Co. of New York*, 145 N. Y. 576, 40 N. E. 225.

It is said, however, that the husband caused the application to be made and that he paid all the premiums. That is true, but

in making the application he represented himself not as acting for himself, but only as agent for his wife, and therefore upon the facts of the case and as between the parties to this suit he must be assumed to have acted as such agent; and in so far as he paid any premium before or after her decease he must be held to have paid it as the agent of those to whom the policy was payable. The payment of the premiums, whether before or after the death of the wife, did not affect the nature or construction of the contract, and did not make him a party to it nor the policy his property: *Swan v. Snow*, 11 Allen, 224; *Baker v. Union Ins. Co.*, 43 N. Y. 283; *Whitehead v. New York Ins. Co.*, 102 N. Y. 143, 151, 55 Am. Rep. 787, 6 N. E. 267.

The change to a paid-up policy is immaterial. As between the parties to this suit the latter policy must stand in the place of the original. If the change was unauthorized, the plaintiff, so far as respects his interest, has ratified it by bringing this suit.

In *Fuller v. Linzee*, 135 Mass. 468, upon which the defendant relies as an authority in support of the proposition that a policy like this is a contract between the insurance company and the person whose life is insured, the question decided was that inasmuch as by the terms of the contract the wife had no interest transmissible unless she survived her husband, her next of kin could not maintain their claim to the fund without proving that she survived him. In that case it appeared that the policy was procured by the husband, and the application was not before the court. Here the application is before the court, and the wife, and not the husband, is shown to be the applicant.

In so far as the case of *Fuller v. Linzee*, 135 Mass. 468, may ⁵⁴¹ seem to be an authority for the proposition that a contract like the one at bar, even where premiums are paid by the husband, is to be regarded under our statutes as a contract with the husband, it is inconsistent with a previous decision of this court in *Swan v. Snow*, 11 Allen, 224, and the decision is to be supported, if at all, by the peculiar circumstances of the case.

In *Bancroft v. Russell*, 157 Mass. 47, 31 N. E. 710, it is stated in the bill and admitted in the answer that the husband "procured the policies," and in the agreed facts that "he caused to be issued" the policy, and there is nothing to show which of the two, the husband or wife, was the one with whom the contract was made. In *Haskins v. Kendall*, 158 Mass. 224, 35 Am. St. Rep. 490, 33 N. E. 495, it directly ap-

pears that the policy was taken out by the husband, and that the contract was with him.

If it be suggested that at the time this contract was made the wife had no authority to enter into such a contract, the answer is that the Public Statutes, chapter 119, section 167 (Gen. Stats., c. 58, sec. 62), distinctly recognize that a contract of insurance of the life of the husband may be "procured" by the wife, and provides that such a contract shall inure to her separate use and benefit and that of her children: See *Swan v. Snow*, 11 Allen, 224; *Burroughs v. State Assur. Co.*, 97 Mass. 359.

It is suggested by the defendant that there is no evidence that the husband was authorized to apply in behalf of the wife, or that she ever knew that he had so applied, but the answer is that this litigation is not between the parties to the contract. The insurance company has recognized the validity of the contract and has paid the money over in compliance with its terms, and it is held by the defendant upon the trust imposed by the contract.

We have here, therefore, a contract between the insurance company and Sarah M. Brayton, by the terms of which the company agrees to pay certain money on the decease of Shubael W. Brayton to her if she be then living, otherwise to her children. She had a vested interest in this sum, liable to be defeated by her death before her husband, but it could not be assigned without her consent nor could even her assignee take any greater estate than she had: *Knickerbocker Ins. Co. v. Weitz*, 99 Mass. 157; *May on Insurance*, 3d ed., secs. 391, 392, and cases therein cited.

⁵⁴² Upon her death during the life of her husband the interest became vested in the children, just as a promissory note would be which was made payable to them after the death of their mother: *Connecticut Ins. Co. v. Burroughs*, 34 Conn. 305, 315, 91 Am. Dec. 725; *Continental Ins. Co. v. Palmer*, 42 Conn. 60, 19 Am. Rep. 530.

This is not a case where a man insures his interest in his own life for the benefit of his wife and children or some other relative, and no beneficiary survives him, but is a case where the wife insures her interest in the life of her husband for her own benefit if she survive him, otherwise for the benefit of her children, and then during the life of her husband dies leaving children surviving her.

In the one case the insured survives the beneficiaries, and in the other the beneficiaries survive the insured; and whatever may be the doctrine respecting a resulting trust in the insured in the former case based on the fact of his survival of the beneficiaries, it is not applicable in the latter case, where the beneficiaries survive the insured. The foundation of the doctrine of a resulting trust, namely, the death of the beneficiaries before the insured, is wanting. And even if it be said that a contract of this kind with a life insurance company is somewhat in the nature of a testamentary disposition, and that the right of the beneficiaries is contingent upon their survival of the person making the contract, the doctrine is not applicable to this case, because the person making the testamentary provision is the wife and not the husband, and the beneficiaries survived her.

After the death of the wife the contract became a promise to pay to the children a certain sum of money on the happening of an event which was sure to occur. There was no uncertainty about it. It was in terms an absolute promise, founded upon sufficient consideration. The general rule is that a promise to pay money at a time in the future sure to arrive inures to the benefit of the legal representatives of the person to whom the money is to be paid, if he be not alive at the time the payment is due, and we see no reason why this rule is not applicable in this case: See *Connecticut Ins. Co. v. Fish*, 59 N. H. 126.

In the opinion of a majority of the court the plaintiff, as the administrator of the estate of one of the children, is entitled to recover.

⁵⁴³ For decisions in other states bearing upon the questions involved, in addition to the cases above cited, see *United States Trust Co. v. Mutual Benefit Ins. Co.*, 115 N. Y. 152, 21 N. E. 1025; *Walsh v. Mutual Ins. Co.*, 133 N. Y. 408, 28 Am. St. Rep. 651, 31 N. E. 228; and the authorities collected in *May on Insurance*, 3d ed., 399, note; *Voss v. Connecticut Ins. Co.*, 119 Mich. 161, 77 N. W. 697; *Harley v. Heist*, 86 Ind. 196, 44 Am. Rep. 285. See, also, for a collection of some of the authorities, *Brown's Appeal*, 125 Pa. St. 303, 11 Am. St. Rep. 900, 17 Atl. 419.

Judgment on the finding.

INSURANCE.—THE PLACE OF CONTRACTS of insurance is considered in *Expressman's Mut. Ben. Assn. v. Hurlock*, 91 Md. 585, 80 Am. St. Rep. 470, and note, 46 Atl. 957.

LIFE INSURANCE.—WHERE A WIFE PROCURED a policy of insurance on the life of her husband, payable to her if living, if not, to her children, and both she and one of the children died be-

fore the husband, it was held that a transmissible interest vested in the children upon the issuing of the policy, and that the heirs of the deceased child took by descent its interest and was entitled to a portion of the amount assured: *Continental Life Ins. Co. v. Palmer*, 42 Conn. 60, 19 Am. Rep. 530. See, further, *In re Estate of Dobbel*, 104 Cal. 432, 43 Am. St. Rep. 123, 38 Pac. 87; *Walsh v. Mutual Life Ins. Co.*, 133 N. Y. 408, 28 Am. St. Rep. 651, 31 N. E. 228.

WELCH v. WALSH.

[177 Mass. 555, 59 N. E. 440.]

GUARANTORS—PAYMENT OF RENT—NOTICE.—A lessor owes no duty to one who has made an absolute, unconditional guaranty that rent shall be paid, either to take active measures to collect the rent from the lessee, or to notify the guarantor that the lessee is in default.

GUARANTORS—NOTICE TO—DEFENSE TO ACTION.—It is no defense to an action against one who has guaranteed the payment of rent that the defendant has suffered from not knowing that the rent was not paid by the tenant for twenty-three months before the plaintiff made a demand upon him for it.

NEGLIGENCE.—WHERE NO DUTY is owed there cannot be negligence.

GUARANTY AND SURETYSHIP.—THE DIFFERENCE between the contract of a guarantor and the contract of a surety is that a guarantor makes a collateral promise to pay, in case default is made by the principal debtor, while a surety contracts directly as a principal to pay the sum of money for which he is secondarily liable.

GUARANTY AND SURETYSHIP—NOTICE OF DEBTOR'S DEFAULT.—No distinction can be made between the contract of a guarantor and the contract of a surety on a bond, so far as concerns the duty of the creditor to give notice of the default of the principal debtor.

GUARANTOR OF A NOTE—NOTICE TO.—The guarantor of a promissory note, even when the only person liable on it is the principal debtor, is entitled to receive notice of the default of the principal debtor, and if he is damaged by not receiving such notice within a reasonable time, he is discharged.

Action on contract against the guarantor of a lease. At the trial the defendant offered to show that during a large part of the period for which the tenant was in default the tenant was in business, regularly paid his debts, and had abundant unencumbered property from which the rent could have been collected, and from which the guarantor could have reimbursed himself. The tenant became insolvent and received his discharge before the defendant knew of the default in rent. Since

that time the tenant has remained insolvent. The court excluded evidence of these facts. Verdict for the plaintiffs.

W. H. Dunbar, for the defendant.

H. N. Shepard, for the plaintiffs.

556 LORING, J. The evidence, which was excluded, would have warranted a finding that the plaintiffs conducted themselves in the matter of collecting the rent now sued for without that care which a man of ordinary prudence would have devoted to it, and that the defendant has suffered from not knowing that the rent was not paid by the tenant for twenty-three months before the plaintiffs made a demand upon him for it; but it would not have warranted a finding of fraud, or facts tantamount to fraud.

557 The defendant contends that those facts would have made out a defense to the action, and relies upon a statement in the opinion of Wells, J., in *Vinal v. Richardson*, 13 Allen, 521, 532; he also relies upon *Oxford Bank v. Haynes*, 8 Pick. 423, 19 Am. Dec. 334, and the numerous cases in this commonwealth which have recognized or followed that case, and also upon *Douglass v. Reynolds*, 7 Pet. 113, *Reynolds v. Douglass*, 12 Pet. 497, and the opinion of Matthews, J., in *Davis v. Wells*, 104 U. S. 159, 161.

It is true that there is a statement in the opinion of Mr. Justice Wells in *Vinal v. Richardson*, 13 Allen, 521, which supports the defendant's contention. In that case he said: "Formal notice is not necessary in order to charge the guarantor with liability. All the cases agree that in this respect there is a distinction between an indorser and a guarantor. Negligence of the holder of the guaranty, in permitting the claim to slumber, when the guarantor might reasonably suppose it had been paid when due, or in the usual course of business, is the real ground on which the guarantor is exonerated. It is delay without notice, not the bringing of a suit without notice, that is fatal to the holder of the guaranty." But that proposition, which was obiter in *Vinal v. Richardson*, 13 Allen, 521, is not consistent with *Watertown Ins. Co. v. Simmons*, 131 Mass. 85, 41 Am. Rep. 196, not cited at the argument in the case at bar, unless a distinction is to be drawn between a guarantor of rent to be paid each month and sureties on a bond conditioned for the monthly payment of sums to be collected by the principal of the bond. *Watertown Ins. Co. v. Simmons*, 131 Mass.

85, 41 Am. Rep. 196, was a case where suit was brought against the sureties on a bond, with the condition just stated, and the defense set up was that the plaintiff had failed to notify the sureties that for thirteen months before a demand was made upon them, the principal had failed to make payment in full of the sums collected by him; it was held that this was not a defense, and on the ground that "the creditor owes no duty of active diligence to take care of the interest of the surety. It is the business of the surety to see that his principal performs the duty which he has guaranteed, and not that of the creditor."

The defendant's difficulty in this case is to make out that a lessor owes any duty to one who has guaranteed the payment of rent.

⁵⁵⁸ It was settled in *Vinal v. Richardson*, 13 Allen, 521, after deliberate consideration, that notice to the guarantor that the tenant has not paid the rent is not a condition on which the guarantor's liability depends. The defendant now contends that, though the guarantor becomes liable upon the default in payment of the rent without notice of it, yet, if the lessor subsequently fails to give notice of that default to the guarantor, and the guarantor suffers damage therefrom, the guarantor is discharged. Where no duty is owed there cannot be negligence, as was lately decided by this court in *Shepard & Morse Lumber Co. v. Eldridge*, 171 Mass. 516, 68 Am. St. Rep. 446, 51 N. E. 9. See, also, *Patent Safety Gun Cotton Co. v. Wilson*, 49 L. J. Q. B., N. S., 713.

The defendant has undertaken to make out that there is a duty on the creditor to give notice to the guarantor. He has undertaken to establish this, in the first place, on general principles, which are common to all cases where persons are secondarily liable; his proposition is that, in every such case, a creditor is bound so to conduct himself in dealing with one primarily liable as not unnecessarily or unreasonably to injure one secondarily liable. But no such duty is owed to those secondarily liable; the duty owed them is a much narrower one; it is to do no act which affects the rights, to which the surety is subrogated on meeting his guaranty, either in property held by the creditor as security for the debt guaranteed, or to bring suit against the principal debtor; if the creditor abstains from doing such an act, he has performed his whole duty to the surety. There is no duty upon the creditor to take active measures to collect the debt from the principal debtor or to no-

tify the person secondarily liable that the principal debtor is in default. No authority beyond *National Bank of South Reading v. Sawyer*, 177 Mass. 490, ante, p. 292, 59 N. E. 76, and *Watertown Ins. Co. v. Simmons*, 131 Mass. 85, 41 Am. Rep. 196, need be cited to that point.

There was nothing in the terms of the contract of guaranty in the case at bar which cast upon the lessor the duty of giving to the guarantor notice that the rent had not been paid. The terms of the guaranty in this case were that the defendant does "hereby guarantee to the said lessors, their heirs and assigns, the true and punctual payment of the rent, taxes, and interest reserved at the times and in the manner there mentioned, and, in default ⁵⁵⁰ thereof, promise to pay the same on demand." That is an absolute, unconditional guaranty that the rent shall be paid, coupled with a promise to pay the same on demand being made upon the guarantor, in case there is a default in the payment of rent by the lessee.

If, therefore, there was any duty upon the lessor to give notice to the guarantor that the rent was in default, it must be found in the nature of the contract of a guarantor, and, after the decision in *Watertown Ins. Co. v. Simmons*, 131 Mass. 85, 41 Am. Rep. 196, in the nature of the contract of a guarantor, as distinguished from the contract of a surety on a bond, such as was before the court in that case. The difference between the contract of a guarantor and the contract usually entered into by a surety is that in case of a guarantor, the promise of the person secondarily liable is a collateral promise to pay, in case default is made by one who is primarily liable for the thing guaranteed, while a surety contracts directly as a principal to pay the sum of money for which he is secondarily liable: See *Bigelow, J.*, in *Allen v. Herrick*, 15 Gray, 274, 285. So far as this difference is concerned, the contract of the surety upon a bond conditioned for the payment of sums collected by a third person partakes of the nature of the contract of a guarantor, and not of the contract of a surety. Moreover, in one of the earliest cases in England in which it was held that notice to a guarantor was not a condition precedent to his liability, the decision was put upon the ground that no such duty was owed by the creditor to the guarantor; it is the case of *Brookbank v. Taylor*, in the exchequer chamber, and reported in *Cro. Jac.* 685; that was a writ of error brought in an action to collect rent from a guarantor; the error assigned was "because it is not alleged that notice was given that the other had

not paid. Sed non allocatur; for he at his peril ought to take cognizance of the nonpayment and pay the rent, otherwise the promise is broken." To the same effect, see Baron Parke, in *Walton v. Mascall*, 13 Mees. & W. 452, 458, and Lord Eldon, in *Wright v. Simpson*, 6 Ves. 714, 734, who says: "But the surety is a guarantee; and it is his business to see whether the principal pays, and not that of the creditor." No distinction, therefore, can be made between the contract of a guarantor and the contract of a surety on a bond, so far as this question is concerned, and what was said in *Watertown Ins. Co. v. Simmons*, 131 Mass. 85, 86, 41 Am. Rep. 196, is applicable to this case: "The surety is bound to inquire for himself, and cannot complain that the creditor does not notify him of the state of the accounts between him and his agent, for whom the surety is liable": See, also, *French v. Bates*, 149 Mass. 73, 81, 21 N. E. 237.

There are doubtless expressions in the early cases in Massachusetts which countenance the proposition that a guarantor is in all cases entitled to notice of the principal debtor's default. It was decided in this commonwealth in *Oxford Bank v. Haynes*, 8 Pick. 423, 19 Am. Dec. 334, that the guarantor of a note, even when the only person liable on it is the principal debtor, is entitled to such a notice, and if he is damnified by not receiving it within a reasonable time, he is discharged; that case has been followed or recognized in many subsequent cases: *Talbot v. Gay*, 18 Pick. 534; *Sigourney v. Wetherell*, 6 Met. 553; *Whiton v. Mears*, 11 Met. 563, 564, 45 Am. Dec. 233; *Bickford v. Gibbs*, 8 Cush. 154; *Parkman v. Brewster*, 15 Gray, 271; *Protection Ins. Co. v. Davis*, 5 Allen, 54, 58. This rule has been recognized for more than seventy years, and it is now too late to question it. When it was first adopted, it was assumed in England, as well as in this commonwealth, that the guarantor of a note had the same right to notice that an indorser had, the only difference between the two being that in the case of a guarantor notice could be given at any time before damage was sustained, and that damage from lack of notice had to be proved: See *Phillips v. Astling*, 2 Taunt. 206; *Van Wart v. Woolley*, 3 Barn. & C. 439; and the later case of *Hitchcock v. Humfrey*, 5 Man. & G. 559. The law seems to be otherwise settled in England to-day: See *Walton v. Mascall*, 13 Mees. & W. 72; but see *Lindley, L. J.*, in *Carter v. White*, 25 Ch. Div. 666, citing with approval *Byles on Bills*, 12th ed., 295, who lays down the Massachusetts rule. The weight

of authority is against the Massachusetts rule; the cases are collected in Ames' Cases on Suretyship, 240, note 1.

It has never been decided that the rule applied in *Oxford Bank v. Haynes*, 8 Pick. 423, 19 Am. Dec. 334, is one of general application. In *Dole v. Young*, 24 Pick. 250, *Clark v. Remington*, 11 Met. 361, and *Paige v. Parker*, 8 Gray, 211, it was assumed that the rule applied in case of a general guaranty for the payment of goods to be subsequently purchased; and in *Cabot Bank v. Bodman*, 11 Gray, 134, it seems to have been assumed to be a rule of general application. But ⁵⁶¹ in none of these cases does the opinion rise higher than a mere obiter dictum, except in the case of *Clark v. Remington*, 11 Met. 361. *Clark v. Remington*, 11 Met. 361, was the case of a guaranty of goods to be subsequently purchased where no notice of any kind was given to the guarantor. The guaranty in question in that case was an offer, and it is settled that in such a case notice of the subsequent purchase must be given: See *Bishop v. Eaton*, 161 Mass. 496, 42 Am. St. Rep. 437, 37 N. E. 665, and cases there cited. *Clark v. Remington*, 11 Met. 361, may well stand on the ground that in that case no notice of the acceptance of the offer by the subsequent purchaser was given; and it may be doubted whether, in a case where notice of the subsequent purchase has been given, so that the guarantor is fully informed of the details of the debt which he has guaranteed, notice of the principal debtor's default must also be given.

It is not necessary to consider now whether notice must be given to the guarantor in cases like *Lennox v. Murphy*, 171 Mass. 370, 50 N. E. 644, in order to throw upon him the duty of seeing that the sums guaranteed by him are paid; it may be that in case of such a contingent guaranty, it is not the duty of the guarantor to see that the sums guaranteed are paid until the contingent guaranty has been made certain by notice stating what sums are due and when they are due, although such notice is not a condition precedent on which his liability depends. See in this connection, Hoar, J., in *Whiting v. Stacy*, 15 Gray, 270.

However that may be, there is no case in this commonwealth in which the rule of *Oxford Bank v. Haynes*, 8 Pick. 423, 19 Am. Dec. 334, has been enforced, in case the thing guaranteed is a debt, definite in amount and in time of payment; but, on the contrary, Chief Justice Shaw said, with reference to that case, in delivering the opinion of this court in *Salisbury v.*

Hale, 12 Pick. 416, 424, which involved the question of a guaranty of rent: "Without deciding whether the doctrines of that case can be extended beyond promissory notes and other mercantile contracts, we are of opinion, upon the principles of that case, notice, in the present, was not necessary," because there had been no change of circumstances.

We are of opinion that when the obligation of the guarantor is to pay a definite sum at a definite time, it is his duty to see that the sum guaranteed is paid, and that there is no duty on the creditor to give notice to the guarantor of a default in payment ⁵⁶² by the principal debtor; and that if the guarantor, in violation of his duty, has slumbered because he supposed that in the absence of a demand by the creditor the act guaranteed had been performed by the principal debtor and has suffered damage from so doing, he has nothing of which he can complain but his own negligence, and is liable to pay the sum which he guaranteed should be paid.

Exceptions overruled.

GUARANTY—NOTICE OF DEFAULT.—In case of an absolute guaranty, the guarantor is not entitled to demand or notice of non-performance; but when the undertaking is collateral, notice must be given within a reasonable time: *Taussig v. Reid*, 145 Ill. 488. 36 Am. St. Rep. 504, 32 N. E. 918. A guarantor of a lease is entitled to notice of default; but this is not a condition precedent to an action upon the guaranty, and the failure to give it discharges only to the extent of damage suffered in consequence: *Ward v. Wilson*, 100 Ind. 152, 50 Am. Rep. 763.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

HEWITT v. REED CITY.

[124 Mich. 6, 82 N. W. 616.]

ARBITRATION AND AWARD — AVOIDANCE — CITATION OF AUTHORITIES.—If, after final submission of a matter to arbitration, under an agreement that neither party should be represented by counsel, one of them presents to the arbitrator, *ex parte*, a list of authorities, the award should be set aside, regardless of whether the arbitrator was influenced thereby or not.

C. A. Withey and Smurthwaite & Fowler, for the appellant.

W. W. Drew and M. Brown, for the appellee.

7 MONTGOMERY, C. J. This is a bill filed to set aside an award. Complainant was injured by reason of a defective sidewalk of the village. A claim was presented to the common council, and after a period of negotiation an agreement was reached to submit the matter in controversy to Honorable James B. McMahon, as arbitrator. A hearing was had before the arbitrator, testimony produced pro and con, and an award made in favor of the village. The bill in this case contains charges of overreaching, made against the village attorney and the president of the village, and also alleges that complainant was not permitted to produce her proofs before the arbitrator. We are not only convinced that these charges are not sustained by a preponderance of the evidence, but we deem it only just to the parties concerned to say that the charges ought not to have been made. There is nothing to indicate any misconduct or overreaching on the part of Mr. Withey, the village attorney, or Mr. Slosson, the village president. Complainant had employed counsel to present her claim to the

village authorities, was aided by the advice of her husband, and, we have no doubt, understood the matter to be submitted; nor have we any doubt that she was permitted to adduce all testimony which she deemed necessary.

The only question which has given us any doubt arises out of the mistaken conduct of the village president in ⁸ furnishing the arbitrator, after the testimony was closed, a memorandum of cases or authorities. Just what these cases related to does not clearly appear, as the memorandum is not produced, and the recollections of Judge McMahon and Mr. Slosson differ. The rule is very strict in excluding any communication to an arbitrator, made *ex parte* after the case is submitted; and when such communication, which may affect the result, is made, it is not usual to enter into an inquiry as to whether the arbitrator was in fact influenced by it or not: *Walker v. Frobisher*, 6 Ves. 70; *Strong v. Strong*, 9 Cush. 560; *Catlett v. Dougherty*, 114 Ill. 568, 2 N. E. 669; *Jenkins v. Liston*, 13 Gratt. 535; 2 Am. & Eng. Ency. of Law, 2d ed., 646. It is contended that this rule should not be applied to the present case, as all that occurred was a mere citation of authorities; but it is to be kept in mind that the arbitrator is judge of the law as well as of the facts, and in this case the parties expressly agreed that neither was to be represented by counsel, thereby stipulating to exclude all legal arguments or briefs. It cannot be denied that the purpose of any citation must have been to influence the mind of the arbitrator on a question of law. We hold, with some reluctance, that this is a violation of the spirit of the terms of the submission.

Judge McMahon himself testified that the handing of this memorandum to him was, to use his language, the most unsatisfactory thing connected with the transaction. If we felt at liberty to determine the case upon the question of whether the result was probably influenced by this representation, we would have little difficulty, as the high character and unquestioned ability of the arbitrator would furnish ample assurance that he was not unduly influenced in the matter; but as this is the first time that the question has been presented to the court in this exact way, we are concerned in laying down a rule easy to follow, and which will afford protection in all cases, and we think the safer rule is for the court to enter into no examination as to whether the arbitrator is in any way influenced by *ex* ⁹ *parte* communications. In applying that rule to this case, and in view of the stipulation that neither

party should be represented by counsel, we are constrained to hold that the arbitration should be set aside.

This was the conclusion reached by the learned circuit judge, and his decree will be affirmed, with costs.

The other justices concurred.

AWARDS, SETTING ASIDE.—Awards are favored in law and reluctantly set aside: *Brush v. Fisher*, 70 Mich. 469, 14 Am. St. Rep. 510, 38 N. W. 446. As to what will justify the setting aside of an award, see the notes to *Jocelyn v. Donnel*, 14 Am. Dec. 754, 755; *Morville v. American Tract Soc.*, 25 Am. Rep. 46, 47; *Brush v. Fisher*, 14 Am. St. Rep. 518.

NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION v. BURCH.

[124 Mich. 56, 82 N. W. 837.]

BUILDING AND LOAN ASSOCIATIONS—USURIOUS CONTRACTS.—A statute providing that premiums, fines, and interest accruing to building and loan associations organized thereunder shall not be deemed usurious cannot be invoked to uphold the usurious contract of a foreign building and loan association, if such contract would be in violation of the state laws if executed within the state.

BUILDING AND LOAN ASSOCIATIONS—PLACE OF CONTRACT—USURY.—A loan made by a building and loan association, secured by mortgage on property situated in another state, which, by the terms of the mortgage is to be paid in the state of the organization of the association, but which the parties to the transaction understand is to be paid in the state where the property is situated, must be governed by the laws of the latter state as to the payment and legality of interest.

C. S. Marr, for the appellant.

Bunker & Carpenter, for the appellees. .

58 MOORE, J. In July, 1898, complainant filed a bill for the purpose of foreclosing a mortgage given to it by the defendants, Albert H. Burch and wife, upon lands in Muskegon, Michigan. The complainant claimed there was due upon the mortgage at the time the decree was made upward of \$1,000. The circuit judge granted a decree in favor of the complainant for the sum of \$157.14, from which decree the complainant has brought the case here by appeal.

It is claimed upon the part of the defendants that the bond and mortgage are usurious, and that the circuit judge gave a

decree for all that complainant is entitled to. Defendants did not appeal. It is claimed on the part of the complainant that the contract is a New York contract, governed by the New York law, and is not usurious. The complainant is a corporation organized under the laws of New York. It claims to be a building and loan association. Its articles of association provide that the principal office shall be in the city of New York. Section ⁵⁹ 2, article 4, provides: "The board of directors may appoint a general advisory board and local advisory boards from among the shareholders at such places as they may deem best." The articles provide the capital of the association to be accumulated shall be \$50,000,000. The shares are \$100 each. Three kinds of shares may be issued, among them: "Paid-up shares of the par value of \$100 will be issued for \$70 per share, upon which there will be paid to the holder semi-annually, from the earnings of the share, interest at the rate of six per cent per annum upon the purchase price. Such shares shall be liable for no further dues or assessments, and will be payable at the maturity of, and in the same manner as, installment shares of the same date": Art. 8, sec. 4.

One person may hold 200 shares, enabling him to invest \$14,000, upon which he shall receive six per cent interest on the purchase price, and share in the profits the same as the installment shares. Another section provides: "Interest at the rate of six per cent per annum will be charged upon all loans, which interest must be paid monthly, with the monthly dues, on or before the last business day of each month, until the maturity of the pledged shares, and a premium of fifty cents per month will be charged on each \$100 borrowed, which premium must be paid on or before the last business day of each month, for the period of eight years, or until the maturity of the pledged shares, should they mature before the expiration of the eight years. The premium for six months in advance will be deducted and retained from such loans": Art. 13, sec. 2.

The mortgage follows the terms of this provision.

Article 13 provides for loans upon the withdrawal value of shares upon the same rates for interest and premiums as charged in the case of loans upon real estate. It is then provided: "The residue of the loan fund not required by shareholders may be invested in such securities as the laws of New York permit for investment of savings banks deposits": Art. 14.

⁶⁰ In 1890 the complainant appointed George W. Howell its agent at Muskegon, "with full power and authority to solicit and receive applications for shares of our association in the said territory, and he is fully authorized and empowered to collect and receipt for entrance fees on all shares of the association so taken by him, but has no authority to collect any other moneys of the association." A local board was organized at Muskegon. Mr. Howell was supplied with the literature of the company, and was active in its interests. His testimony, in part, is: "The association had a local board here. I organized it. There was a president, vice-president, secretary, treasurer, and board of appraisers. The object of the local board was to look after the interest of their business here in Muskegon—to do the local business of the association. It did this up to the time when the local board was dissolved. This local board was in existence at the time this mortgage was given by Mr. Burch, and for some time afterward; I have forgotten how long. I think the first treasurer of the local board was W. R. Laughray. The local treasurer gave a bond, and collected the money here."

Mr. Burch was the owner of a lot upon which there was a mortgage of \$400. He was interviewed by Mr. Howell, and assured that, if he would become a member of the association, he could obtain from it a loan of \$1,000, which would enable him to pay off the mortgage and build a house upon his lot, and could obtain this money at a cost of six per cent, and that all sums of money above that amount paid by him would be applied upon the principal of the loan. Mr. Burch says that, relying upon these statements, and for the sole purpose of borrowing the money to enable him to pay off the mortgage on his lot and build a house thereon, he subscribed for ten shares of stock, and soon thereafter applied for a loan of \$1,000. Mr. Howell's version of the matter is not very different from that of Mr. Burch. He undoubtedly believed the statements he made to be true. The application for the loan was accepted by the company, and for the purpose of securing its payment Mr. Burch assigned to the company ⁶¹ his shares of the stock as collateral security, and executed a mortgage on his land in Muskegon for \$1,000. Mr. Howell took the application for the loan. The land was appraised by members of the local board, and the loan approved by the officers in New York city. The loan, according to the terms of the mortgage and the bond accompanying it, was payable at the office of the company in

New York. After the loan was approved, a check for \$582 and one for \$18 were sent to the local attorney of the company at Muskegon. They were both indorsed by Mr. Burch, who was allowed to retain the one for \$582. The \$18 check was used by the company as six months' premium on the loan. Afterward a check for \$379.87 was given to Mr. Burch, the company retaining \$11.13 as premium on the loan, and \$9 as interest. These items made up the \$1,000 for which the mortgage was given. The local attorney examined the title to the lands, and turned over the checks to Mr. Burch. The mortgage was delivered to the local attorney, put upon record, and sent to the complainant. Mr. Burch made payments to the treasurer of the local association. He paid, in all, the sum of \$1,080.26. It is claimed by the association that the payments were applied as follows: For dues on the shares, \$402; fines, \$42; interest on loan, \$318.13; premium on loan, \$318.13. Mr. Burch was unable to keep up his payments. The association, in June, 1898, applied the withdrawal value of the shares, said by them to be \$381.66, upon the mortgage, and filed this bill to foreclose it, claiming, as we have before stated, that more than \$1,000 was due.

The first thing to be considered is, Was the contract in violation of our usury law? According to the articles of the association, and the terms of the mortgage also, Mr. Burch was to pay for this loan six per cent interest, and as premium five dollars a month for eight years, or until the loan was all paid or the shares matured. If we eliminate the payment of dues upon the shares, it is apparent the mortgage calls for a payment for interest of upward of ⁶² twelve per cent on the loan for a period of eight years, or until the pledged shares mature, and would be usurious, under our usury laws (2 Comp. Laws 1897, sec. 4856), unless it is saved by the provisions of our laws governing building and loan associations: 2 Comp. Laws 1897, sec. 7584. That section refers only to corporations organized under the act. The Michigan act also requires the directors to loan the surplus to the stockholder who shall bid the highest premium (2 Comp. Laws 1897, sec. 7581); while it will be observed there is no such provision in the New York association, but, on the contrary, it requires a borrower to pay, in addition to six per cent interest, a fixed premium on the sum borrowed. In this state such a contract could not be enforced by an association organized under our law: *Myers v. Alpena etc. Bldg. Assn.*, 117 Mich. 389, 75 N. W. 944. Such

a provision is contrary to the spirit and purpose of a building and loan association: See *McCauley v. Building etc. Assn.*, 97 Tenn. 421, 56 Am. St. Rep. 813, 37 S. W. 212, and note, where there is a full collation of the authorities. The articles of association also provide for loans on shares at the withdrawal value thereof at the same rate of interest charged upon real loans. The directors are authorized to invest the residue of the loan fund in such securities as the laws of New York permit for the investment of savings banks deposits. Our statute, applying to building and loan associations (2 Comp. Laws 1897, sec. 7584), reads as follows: "Corporations organized under this act being of the nature of co-operative associations, therefore no premium, fines, nor interest on such premiums that may accrue to the said corporation, according to the provisions of this act, shall be deemed usurious, and the same may be collected as other debts of like amount may be collected by law in this state."

Our law does not authorize the issuance of paid-up shares, thus allowing persons to make investments which shall bring them rates of interest much in excess of that allowed by our usury laws. We think it very clear that ⁶³ a Michigan building and loan association could not do what was done here.

It is said the contract is a New York contract, and must be governed by the New York law, and for that reason can be enforced. We do not think it at all clear this is a New York contract, or that it was so understood to be when it was made. While by the terms of the mortgage the loan was to be paid in New York, it was expected the money would be paid to the treasurer of the local branch at Muskegon, and most of it was paid to him.

A case quite similar to this was passed upon in *Meroney v. Atlanta etc. Loan Assn.*, 116 N. C. 882, 47 Am. St. Rep. 841, 21 S. E. 924, where the following language is used:

"Wharton, in his treatise on the Conflict of Laws, section 510, says of the question 'whether, when a mortgage is given as security for a loan, and the mortgage is in one state and the place of payment of the loan in another, the law of the former state or that of the latter state is to prevail in the settlement of interest,' that it has been frequently litigated in the United States, and 'with results which, on their face, are irreconcilable.' And the learned author says: 'The true test is, Was the mortgage merely a collateral security, the money being employed in another state and under other laws, or was the money

employed on the land for which the mortgage was given? If the former be the case, then the law of the place where the money was actually used, and not that of the mortgage, applies. If the latter, then the law of the place where the mortgage is situate must prevail.' It is stated in the elaborate brief of the learned counsel for appellant that the authorities cited by Wharton do not sustain the rule thus laid down by him. Among these cases is *Chapman v. Robertson*, 6 Paige, 627, 31 Am. Dec. 264, in which it was adjudicated, as stated in the head-notes of that case in 31 Am. Dec. 264, that 'the construction and validity of personal contracts depend on the laws of the place where they were made, unless they were entered into with the view of being performed elsewhere'; and also that 'transfer of lands or other heritable property, and the creation of liens thereon, is governed by the laws of the place where such property is situate.' Of this case ⁶⁴ Folger, J., said in *Dickinson v. Edwards*, 77 N. Y. 573, 33 Am. Rep. 671: '*Chapman v. Robertson*, 6 Paige, 627, 31 Am. Dec. 264, is a case often cited and relied upon, but it does not impugn the general rule that the validity of a purely personal contract is to be tried by the law of the place of its performance. The learned chancellor concedes that the case would have come clearly under that principle if the contract in suit had been only the personal contract of the defendant; but he holds that, as it was a mortgage actually executed here, by a resident here, upon lands here, for moneys loaned to be used here, though to be repaid elsewhere, the law of this state would fix the legality of the rate of interest reserved; and he further reasons that the contract was partly made here actually in reference to our laws, with an appeal to our courts contemplated by the parties, if necessary.'

"A distinction seems thus to be clearly recognized between a contract 'purely personal' (as, for instance, a promissory note executed in this state, but made payable bona fide in Georgia), and a contract not 'purely personal' (as, for instance, a loan of money by a citizen of Georgia to a resident here to be repaid in that state, and to be evidenced by note so payable, and mortgage on land in this jurisdiction).

"In *Jackson v. American Mortgage Co.*, 88 Ga. 756, 15 S. E. 812, Blackley, C. J., speaking of a loan of money made by the defendant to the plaintiff in New York, but secured by a mortgage on land in Georgia, where he resided, says: 'There was not one contract for making notes and another for securing them by a conveyance, but a part of one and the same contract

was expressed in the notes, and a part in the deed executed at the same time. . . . There was no intention to make a loan without having it secured both by notes and a deed. It was, therefore, impossible to accomplish the object without calling in the law of Georgia as to a part of the transaction. New York had no law which could make any contract conveying land situated in Georgia operative or obligatory. As the law of Georgia would thus be essential with respect to a part of the transaction, that law, if possible, ought to be applied to the whole. There was no intention to make a mere personal contract, but the scheme was to make one party personal, and partly confined by its very nature to a given situs, to wit, the state of Georgia.' See, also, *Martin v. Johnson*, 84 Ga. 481, 10 S. E. 1092, which was a suit to foreclose a ⁶⁵ mortgage, the debt being payable in Massachusetts. It is there said: 'There is a portion of this contract which, under no circumstances, could be enforced in the state of Massachusetts—that as to the land upon which it is sought to set up a lien. Nor can we very readily see how any portion of this contract could be enforced in the state of Massachusetts against a person resident in the state of Georgia.'

"The difference in the contracts makes a difference in the rule applicable to their enforcement. Hence, in *Pine v. Smith*, 11 Gray, 38, it was decided that a note made in Massachusetts and secured by mortgage on land in that state, although payable in New York, was to be construed by the Massachusetts law; and in *Thompson v. Edwards*, 85 Ind. 414, it was held that if A, of Indiana, borrowed in Indiana, on notes secured by a mortgage on land there, money of a citizen of New York, some of the notes being payable in New York and some specifying no place of payment, the contract was an Indiana contract, and the question of its being usurious was to be tested by the law of that state. In *Pancoast v. Travelers' Ins. Co.*, 79 Ind. 172, the notes and mortgage were payable in Connecticut, and the court said: 'It is true that the notes and mortgage are made payable at Hartford, in the state of Connecticut. But it is true that they were executed in this state, the mortgagor lives in this state, the lands lie in this state, and from the terms of the mortgage it is clear that the intention of the parties was that the contract was to be enforced in this state. The mortgage could be enforced nowhere else. In such a case the law of this state governs, the rate of interest being fixed in accordance with the laws of this state.'

"The doctrine which Dr. Wharton announces seems to us just and reasonable. It has been repeatedly held that such transactions would constitute 'doing business' in this state, so as to subject the foreign money lender thus conducting himself to a license tax: *Murfree on Foreign Corporations*, secs. 65, 69, and cases cited. The contention of the defendant corporation seems to us to amount to this: That it must be allowed to do business in North Carolina in total disregard of North Carolina's statutes and the decisions of her courts; that it shall be allowed to take mortgages on North Carolina land, from a resident owner, for money loaned to the resident, to be used here, and foreclose them ⁶⁶ in North Carolina courts, where alone jurisdiction for foreclosure could reside, and where alone it must have contemplated enforcing its rights, if a resort to courts should be necessary, not by North Carolina statutes and the decisions of her courts, but by Georgia statutes and the decisions of its courts; in fine, that it shall be allowed to override, in the courts of this state, the laws of this state and its well-settled policy as to the borrowing and lending of money. We cannot accede to this proposition, but, instead, we choose to adopt the doctrine announced by Wharton, quoted above, which seems to us more reasonable, and which he assures us is sustained by the authorities."

In *Freie v. Fidelity Sav. Union*, 166 Ill. 128, 57 Am. St. Rep. 123, 46 N. E. 784, the following language is used: "But it is insisted that a foreign corporation organized as a building and loan association cannot contract for premiums and fines in addition to interest without violating the statutes against usury. The rule as to foreign corporations is that such a corporation created in another state may, upon the principle of comity, exercise within this state the powers conferred by its charter, if not inconsistent with the public laws or policy of this state: *Stevens v. Pratt*, 101 Ill. 206; *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375, 56 Am. Rep. 776, 6 N. E. 183; *Barnes v. Suddard*, 117 Ill. 237, 7 N. E. 477. By the statute of Indiana, under which complainant was organized, it had power to enter into the contract in this case, and it was not contrary to the laws or policy of this state, which permit the organization of like corporations with the same powers." To the same effect is *Rhodes v. Missouri Sav. etc. Co.*, 173 Ill. 621, 50 N. E. 998. See, also, *Lindsay v. United States etc. Loan Assn.*, 120 Ala. 156, 24 South. 171; *Interstate Sav. etc. Assn. v. Strine*, 58 Neb. 133, 78 N. W. 377; *National Mut. Bldg. etc. Assn. v.*

Keeney, 57 Neb. 94, 77 N. W. 442; Falls v. United States etc. Bldg. Co., 97 Ala. 417, 38 Am. St. Rep. 194, 13 South. 25; Cotton States Bldg. Co. v. Reily (Tex. Civ. App.), 50 S. W. 961.

These cases are not in conflict with Russell v. Pierce, 121 Mich. 208, 80 N. W. 118, or Phelps v. American etc. Loan Assn., 67 121 Mich. 343, 80 N. W. 120. It does not appear in either of those cases that what was done would be in violation of our law if done by a Michigan building and loan association.

In 1895 the legislature passed a law making it unlawful for a building and loan association organized outside of the state of Michigan to conduct or engage in business in this state without filing with the secretary of state a copy of its articles of incorporation, and paying at the same time a franchise fee: 2 Comp. Laws 1897, sec. 7592 et seq. The record discloses this company never complied with this provision of the law. The question is now raised as to whether it can resort to our courts to enforce contracts, even though they were made before this law was enacted, counsel citing People's Mut. Ben. Soc. v. Lester, 105 Mich. 716, 63 N. W. 977; Equitable Loan etc. Assn. v. Peed, 153 Ind. 697, 52 N. E. 201; Seamans v. Temple Co., 105 Mich. 400, 55 Am. St. Rep. 457, 63 N. W. 408. The record does not disclose that the jurisdiction of the court was questioned in the court below. The defendants did not appeal from the decree. We decline to enter upon a discussion of that branch of the case.

The taxes of 1892 upon the mortgaged land were not paid. The defendant Thorpe obtained a tax title thereon. The bill charges a conspiracy between Mr. Burch and Mr. Thorpe to allow this land to be sold for the purpose of cutting off the lien of the mortgage. The circuit judge dismissed the bill as to Mr. Thorpe. We think the conspiracy is not shown.

The decree of the court below is affirmed.

The other justices concurred.

USURY—CONFLICT OF LAWS.—A loan by a corporation to a citizen of another state, secured by a mortgage on land in that state at usurious interest there, is governed in the settlement of interest on foreclosure by the law of the latter state, although the contract of loan and mortgage stipulates that it is solvable by the laws of the state of the domicile of the corporation, and is made with reference to its laws: Meroney v. Atlanta etc. Loan Assn., 116 N. C. 882, 47 Am. St. Rep. 841, 21 S. E. 924. See, further, Hale v. Cairns, 8 N. Dak. 145, 73 Am. St. Rep. 746, 77 N. W. 1010; Big-hampton Trust Co. v. Auten, 68 Ark. 299, 82 Am. St. Rep. 230, 57 S. W. 1105.

CASSERLY v. WAYNE CIRCUIT JUDGE.

[124 Mich. 157, 82 N. W. 841.]

MECHANICS' LIENS—PROCEEDINGS TO ENFORCE. WHEN COMMENCED.—Under a statute providing that mechanics liens shall continue for one year after the statement of lien is filed, and no longer, unless proceedings are begun to enforce the lien, and that such proceedings shall be by bill in chancery and notice of lis pendens, and that all persons having rights or like liens in the property, or having filed notice of intention to claim a lien, shall be made parties, the proceedings are begun when the bill is filed and the fact that the principal contractor is not made a party until after the year has expired cannot affect the rights of the complainant lienholder.

PLEADINGS—AMENDMENT BRINGING IN NEW PARTY—LIMITATIONS.—If, in proceedings to enforce a mechanic's lien, a necessary party is made a party by amendment of the bill after the statutory time for bringing suit has expired, he is the only person who can take advantage of the fact that he was not made a party to the bill within the time limited.

EQUITY—AMENDMENT OF PLEADING—RIGHT TO ANSWER.—If a bill in equity is formally amended by merely adding a new party defendant, after the answer has been put in, the original defendant, if he then answers, can answer only as to new matter introduced by the amendment, and cannot put in an answer making an entirely new defense.

Bacon & Yerkes, for the relator.

Russel & Campbell, for the respondent.

157 LONG, J. Relator applies for a writ of mandamus to **158** compel respondent to vacate an order striking the answer of the relator from the files in a cause pending in the Wayne circuit court, in chancery, wherein the Union Trust Company is complainant and the relator and others are defendants. The respondent has made return to an order to show cause.

It appears that the bill of complaint in the cause in which the order complained of was entered was filed September 3, 1897, for the purpose of foreclosing a mechanic's lien upon property owned by relator. Relator and the other defendants answered the bill, and on November 4, 1898, the cause was heard upon pleadings and proofs taken in open court. Several objections to the proceedings were made at and during the hearing, and, among others, that the principal contractor was a necessary party to the suit, and, as he had not been made a party, the bill should be dismissed. At the close of the testimony, the court (Frazer, J.) said: "I think the principal contractor in

the case should have been made a party defendant. If the complainant desires to be heard on this question, I will hear him. If not, a decree may be entered dismissing the bill of complaint. I think all other objections to the bill are not tenable."

Application was thereupon made to amend the bill, and due notice thereof given. An order was made permitting said amendment, and the amendment was made, making the principal contractor a party. Subpoena was served upon him, and the bill was taken as confessed against him for want of answer. After the bill had been taken as confessed by the principal contractor, and on January 24, 1900, the relator herein, the owner of the property, filed an entire new answer to the amended bill, which answer contained all the statements of the original answer, and in addition thereto introduced some new matters of defense, and on January 27th filed a further amendment to paragraphs 11 and 12 of the said answer, wherein additional new matter of defense was set up. On January 30th ¹⁸⁹⁹ complainant made a motion to strike the amended answer and the amendment thereto from the files. The motion was granted, and the relator now asks that the order be set aside.

It appears that the original answer and the amendment thereto, filed by relator before the case was heard, alleged the following matters in defense to the suit: 1. That the times when the first of the lumber and materials were furnished and when the last of the lumber and materials were furnished are not correctly stated; 2. That the lumber was never accepted, and that it was not used in the building; 3. That there was nothing due to the complainant for lumber and materials furnished for the construction of the building upon relator's property.

It also appears that, in addition to the defenses set up in the answer, relator at the hearing made the following objections to the proceedings: (a) That the bill was not properly sworn to and signed; (b) That the lumber did not go into the building; (c) That relator was not the owner of the property at the time the contract was made; (d) That the account of the Union Trust Company, receiver, with the principal contractor, was so mingled that the amount due for lumber and materials for this particular building could not be determined; (e) That the principal contractor was a necessary party; (f) That the statement of the claim for lien was not in accordance with the statute.

That these objections were made and considered by the court appears from the written opinion of Judge Frazer, attached to

the return now before us. All these objections were finally determined by the court at that time. It was there said: "I think all the other objections to the bill are not tenable." This had reference to the objections above set forth.

An examination of the new answer and the amendment thereto discloses the following defenses: 1. That the statement in the bill of complaint as to the ¹⁶⁰ time when the first of the lumber was furnished and when the last was furnished is not correct; 2. That the lumber was not accepted, and that there is nothing due; 3. That no correct statement of the claim was ever served upon relator, or filed with the register of deeds. It is seen that these are the identical defenses disclosed by the original answer, and were all disposed of by Judge Frazer in his opinion set forth above.

The new answer and the amendment allege the following new matters of defense: 1. That the suit is barred by the statute of limitations; 2. That the complainant had no right to amend its bill by making the principal contractor a party; 3. That relator has paid the principal contractor in full, and that therefore there can be no lien; 4. That the mechanic's lien law is unconstitutional.

It is the claim of relator that the order of the court striking the amended answer and the amendment thereto from the files has prevented the relator from availing himself of the defense that the said complainant is barred from proceeding under its amended bill of complaint because of not having made the original contractor a party defendant within the time required by the statute for enforcing mechanics' liens; that this defense could not be interposed by relator until after complainant had filed its amended bill.

It appears, as we have seen, that when the matter was on argument before Judge Frazer the objection was made by relator that the contractor was not made a party to the bill. The court thereupon permitted the complainant to amend its bill by making him a party. The statute provides (3 Comp. Laws 1897, sec. 10,718) that: "The several liens herein provided for shall continue for one year after such statement or account is filed in the office of the register of deeds, and no longer, unless proceedings are begun to enforce the same as hereinafter provided; and such liens shall take priority as follows."

Section 10,719 provides: ¹⁶¹ "Proceedings to enforce such lien shall be by bill in chancery, under oath, and notice of lis pendens filed for record in the office of the register of deeds

shall have the effect to continue such lien pending such proceedings. And in such proceedings the complainant shall make all persons having rights in said property affected, or to be affected, by such liens so filed in the office of the register of deeds, and all persons holding like liens so filed, and those having filed notice of intention to claim a lien, parties to such action. . . . Intervening or cross bills shall be on oath, and all bills sworn to shall be evidence of the matters therein charged, unless denied by answer under oath."

We think, under this statute, the fact that the principal contractor was not made a party to the bill until after the year had expired cannot affect the rights of complainant. The proceedings must be begun within one year, and such proceedings are begun when the bill is filed. Additional necessary parties may be brought in thereafter. In *Sheridan v. Cameron*, 65 Mich. 680, 32 N. W. 894, the bill was filed to enforce a mechanic's lien, and it was said: "We think the filing of a bill or petition is the beginning of the suit, and that the service of process is only a step in the cause." Amendments of this character have generally been allowed: *Rugg v. Bassett*, 101 Mich. 441, 59 N. W. 645; *Kerns v. Flynn*, 51 Mich. 573, 17 N. W. 62. See, also, *Hannah & Lay Mercantile Co. v. Mosser*, 105 Mich. 18, 62 N. W. 1120.

But we think the rule is well settled that the new defendant, only, could take advantage of the fact that he was not made a party within the year, even if such a defense could be made by anyone: *Boisot on Mechanics' Liens*, sec. 577, and cases there cited; *Phillips on Mechanics' Liens*, sec. 431, and cases there cited. We are aware that the case of *Bombeck v. Devorss*, 19 Mo. App. 38, cited by counsel for relator, holds that in such case the principal contractor must be made a party within the time limited for filing the bill. We think that case is not in harmony with the general rule. In *Green v. Clifford*, 94 Cal. 49, 29 Pac. 331, a contractor was brought in by amendment after ¹⁶² the statutory time to bring suit had expired. The court allowed the judgment made after this amendment to stand, and say: "The appellant [the owner of the property] could not be prejudiced by this amendment, although made after the statutory time for commencing the action."

It is also contended by relator that complainant having amended its bill, even by bringing in the contractor as a party defendant, relator had the right to file an answer to the amended bill setting up new defenses, or contradictory defenses to

those contained in the answer to the original bill. On the other hand, it is contended by counsel for respondent that where a bill is amended, the answer having already been put in, the defendant, if he answers, should answer only as to new matters introduced by the amendment. In this we think counsel for respondent are correct. The amendment to the bill by adding a new party defendant in no way changed the cause of action as stated in the bill, and in no way affected defendant's rights. The amendment was purely formal. It introduced no new matter into the bill, and there was, therefore, nothing in the amendment requiring a further answer by defendant. The case had already been heard on proofs taken in open court, and, as said by counsel for respondent: "The defendant, by his new answer, is endeavoring to try over again issues which have already been decided against him."

Puterbaugh on Chancery Practice, third edition, 118, lays down the rule that: "In answering an amended bill, the defendant, if he has answered the original bill, should answer only those matters which have been introduced by the amendments. In fact, the answer to an amended bill constitutes, together with the answer to the original bill, but one record."

The same rule is laid down in Jennings on Chancery Practice, 89. See, also, 1 Barb. Ch. 159, and 1 Daniell's Chancery Practice, 729.

In *Salisbury v. Miller*, 14 Mich. 160, it was said: "It is claimed that it was irregular to proceed to a hearing after the bill was amended without a further ¹⁶³ answer from Miller or a default. Had any new matter been introduced into the bill, he would have had a right to answer further; but where nothing but the name of a new defendant was introduced, no such step was required, as it in no way changed the aspect of the suit as against Miller": See, also, *Munch v. Shabel*, 37 Mich. 166. But counsel for relator cite 1 Daniell's Chancery Practice, 409, as follows: "Any amendment of a bill, however trivial and unimportant, authorizes a defendant, though not required to answer, to put in an answer making an entirely new defense, and contradicting his former answer."

It is contended by counsel for respondent that this rule laid down by Daniell is in conflict with the rule already stated by the same author; that it is broader than the authorities cited for it warrant; and that, giving it the most favorable construction possible, it cannot be held to apply to cases like the one at bar. We are satisfied that the rule laid down by Daniell

could not be applied to a case like the present, even if it is the rule applied in some cases. The only change in the bill was in making the contractor a party defendant, and, as we have said, it in no way changed or affected the rights of the defendant. In such a case we think no further answer was required, as was held in *Salisbury v. Miller*, 14 Mich. 160, and that defendant, in answering, had no right to include new matter in the answer. The original answer covered the particular defenses to the original bill, and the court was not, therefore, in error in striking the amended answer from the files.

The writ must be denied.

The other justices concurred.

LIMITATION OF ACTIONS.—As to what amounts to a commencement of an action, within the meaning of the statute of limitations, see *Georgia Home Ins. Co. v. Holmes*, 75 Miss. 390, 65 Am. St. Rep. 611, 23 South. 183; note to *Ross v. Luther*, 15 Am. Dec. 344-347.

MECHANIC'S LIEN.—THE STATUTE OF LIMITATIONS begins to run against a mechanic's lien from the time it is filed: *Par-due v. Missouri Pac. Ry. Co.*, 52 Neb. 201, 66 Am. St. Rep. 489, 71 N. W. 1022.

LIMITATION OF ACTIONS.—THE EFFECT OF AMENDING a pleading to bring in a new party as to whom the action is barred is considered in *East Line etc. Ry. Co. v. Culberson*, 72 Tex. 375, 13 Am. St. Rep. 805, 10 S. W. 706; *Leatherman v. Times Co.*, 88 Ky. 291, 21 Am. St. Rep. 342, 11 S. W. 12; *Chicago etc. R. R. Co. v. Jones*, 149 Ill. 361, 41 Am. St. Rep. 278, 37 N. E. 247.

BLACKBURN v. BLACKBURN.

[124 Mich. 190, 82 N. W. 835.]

LIMITATION OF ACTIONS—ABSENCE FROM STATE - HUSBAND AND WIFE.—A statute providing that the time of the absence of a party from the state after the accrual of a cause of action against him shall not be taken as any part of the time limited for the commencement of the action applies when both the maker and payee of a note, husband and wife, remove to and reside for a time in another state.

J. H. Cobb, for the appellant.

F. Emerick, for the appellee.

191 LONG, J. The claimant, Cynthia A. Blackburn, is the widow and administratrix of the estate of George N. Black-

burn, who died intestate on October 9, 1895. She was married to him in the year 1883, at Alpena, where both had resided for some years. At this time she was a widow, and Blackburn a widower, with two children, of whom the contestant, William A. Blackburn, is one. On May 7, 1884, Mrs. Blackburn sold and conveyed to her husband an undivided one-half of a house and lot, of which she was the owner, in the city of Alpena, together with a considerable amount of household furniture, for the sum of two thousand three hundred dollars; receiving therefor three promissory notes, bearing the common date of May 7, 1884, with interest at seven per cent—the first for seven hundred dollars, payable one year from date, and the second and third each for eight hundred dollars, payable, respectively, two and three years from date. On the trial the execution of these notes by the deceased was duly proved, but when the same were offered in evidence, the estate objected to their reception because said notes, upon their face, appeared to be outlawed. There were upon each of these notes indorsements of payment sufficient to save the bar of the statute of limitations, if they had been in the handwriting of deceased, but they were not; and claimant was unable to make any proof in regard to such indorsements or payments, except by her own testimony, which was rejected as incompetent. It was then made to appear that said George N. Blackburn, together with his wife and family, removed from the city of Alpena, with their household effects, and took up their permanent residence in the state of North Carolina, on the sixteenth day of May, 1888, and that said George N. Blackburn, together with his wife and family, continued to reside in the state of North Carolina, and remained absent from the state of Michigan, from that date until July 3, 1892 (a period of four years, one month, and seventeen days), when said Blackburn, wife and family, returned to and continued to reside in Alpena until his death. Upon this being made to appear, the court held the first of said notes **192** to be outlawed, and the second and third not outlawed, and permitted a recovery upon such last-named notes for the amount conceded to be due thereon, after compelling claimant to deduct the amount of said indorsements and interest therefrom. Contestant, William A. Blackburn, brings error.

It is claimed by counsel for claimant that the second and third of these notes, falling due, respectively, May 10, 1886, and 1887, were saved from being barred by the statute of limitations by the exception created by the latter part of section

9736 of 3 Compiled Laws of 1897, which provides: "If, after any cause of action shall have accrued, the person against whom it shall have accrued shall be absent from and reside out of the state, the time of his absence shall not be taken as any part of the time limited for the commencement of the action."

It is conceded by counsel for contestant that if George N. Blackburn alone had been absent from and resided out of the state, and in the state of North Carolina, the time of such absence could not be taken as a part of the time limited for commencement of action; but it is claimed that where both parties (the maker and the payee of the note) go out of the state, and take up a residence in the same state, the statute above has no application. The argument in support of this contention is that, if a creditor has the means at all times of making his cause of action perfect, it would be unjust and oppressive to hold that he could postpone indefinitely the time for enforcing his claim, by failing to present it.

If it were to be admitted that these notes were barred by the statute of limitations of North Carolina, it would constitute no bar to an action in this state. As was said by Kent, C. J., in *Ruggles v. Keeler*, 3 Johns. 267, 3 Am. Dec. 482: "A foreign statute of limitations can no more be pleaded to a suit instituted here than it can be replied to a plea under our statute. Statutes of limitations are municipal regulations founded on local policy, which have ¹⁹³ no coercive authority abroad, and with which foreign or independent governments have no concern."

It is, we think, well settled that, though the claimant resided with the deceased in the state of North Carolina for the time stated, yet that fact would not take the case out of the exception created by this section of the statute: *Kempe v. Bader*, 86 Tenn. 189, 6 S. W. 126; *Ruggles v. Keeler*, 3 Johns. 263, 3 Am. Dec. 482; *Graves v. Weeks*, 19 Vt. 178; *Hartley v. Crawford*, 12 Neb. 471, 11 N. W. 729; *Bulger v. Roche*, 11 Pick. 36, 22 Am. Dec. 359; 2 Wood's Limitations of Actions, sec. 245, and note.

In *Kempe v. Bader*, 86 Tenn. 189, 6 S. W. 126, the action was upon two promissory notes made in the state of Missouri, both maker and payee being residents of that state at that time, and for several years thereafter. At the time suit was brought the maker of the note (Bader) had become a resident of Tennessee, while the payee, Kempe, still remained a resident of Missouri. The defendant pleaded in bar of the action

the statute of Tennessee of six years, but the plaintiff replied the section of the statute of Tennessee similar to our statute under consideration; and it appeared that defendant, after his removal to Tennessee, had been absent from that state from July, 1878, to November, 1879, or a sufficient time, if this exception was applicable to these parties, to save the action. It was insisted that this section was not applicable, inasmuch as both parties were nonresidents at the time the right of action accrued, and that the plaintiff was still a nonresident. The court held that the residence of either or both of the parties when the cause of action accrued or when the action was brought had no effect in limiting the effect of this exception, and that the suit was not barred.

In *Graves v. Weeks*, 19 Vt. 178, it was held that an action in which both parties were nonresidents would be sustained, although the cause of action was barred at the commencement of the suit by the statute of limitations of the state of which both parties were resident citizens.

¹⁹⁴ But whatever may be said of the general rule, it is well settled by the decisions of North Carolina that these notes were not barred by the statute of limitations of that state. Under the statutes of that state, both as to personal and real actions, a woman under the disability of coverture is expressly excepted from the operation of all their statutes of limitations: 1 Code 1883, secs. 148, 163. The courts of that state have uniformly held that none of the married woman's acts has any effect to cause the statute of limitations to run against a woman under the disability of coverture: *State v. Troutman*, 72 N. C. 551; *Campbell v. Crater*, 95 N. C. 156; *Summerlin v. Cowles*, 101 N. C. 473, 7 S. E. 881.

The judgment of the court below must be affirmed.

The other justices concurred.

THE STATUTE OF LIMITATIONS OF THE FORUM must govern: Note to *Lamberton v. Grant*, 80 Am. St. Rep. 426.

LIMITATION OF ACTIONS.—THE EFFECT OF ABSENCE from the state on the running of the statute of limitations is discussed in *Van Santvoord v. Roethler*, 35 Or. 250, 76 Am. St. Rep. 472, 57 Pac. 628; *Latimer v. Trowbridge*, 52 S. C. 193, 68 Am. St. Rep. 893, 29 S. E. 634; notes to *Moore v. Armstrong*, 36 Am. Dec. 72-77; *Langdon v. Doud*, 83 Am. Dec. 644, 645.

IVES v. EDISON.

[124 Mich. 402, 83 N. W. 120.]

INJUNCTIONS—PROTECTION OF EASEMENT.—If a person is granted an easement in a flight of stairs by deed, to remain at the place where they are then located, and he refuses permission to change their location and begins suit to enjoin such change, he is entitled to an injunction to compel the restoration of the stairway, if, after the dismissal of his suit and pending an appeal therein, the defendant makes the change, although the cost of restoring the building to its former condition is greater than the injury to the complainant.

C. E. Ward, for the appellant.

Knappen & Kleinhaus, for the appellee.

403 MOORE, J. Prior to May, 1886, there was a four-story brick block, known as the "McReynolds Block," at the corner of Lyon and Canal streets, in the city of Grand Rapids. The block had a frontage of about eighty feet on Canal street and ninety feet on Lyon street. The north half of the block is now owned by the Richmond estate. The south half was then owned by Edison and Tolford. In the center of the block, leading from Canal street, there was a stairway about five and one-half feet wide, reaching to the second story of the block. This stairway was one-half on the south half, and one-half on the north half, of the block. The only access to the upper three stories of the block from Canal street was up this stairway. On the second story of the block was a rotunda reaching across the entire width of the two center stores. Immediately in front of the stairway from Canal street, but at the farther side of the rotunda, was a stairway leading to the third story of the building. A gallery running all around the rotunda enabled one to reach the rooms surrounding the rotunda in the third story. A flight of stairs on each side of the second stairway reached from the third to the fourth floor of the building, where there was a similar gallery to the one in the story below. The rotunda was lighted from the roof. In May, 1886, Calvin L. Ives bought the south store in this block, subject to a mortgage of six thousand dollars, for the sum of sixteen thousand dollars, and a deed was executed and delivered to him on the tenth day of that month. The deed, in addition to conveying the south nineteen feet and nine inches of the block, contained the following provisions:

"Granting and conveying, also, for the consideration aforesaid, unto the party of the second part, his heirs, executors, administrators, and assigns, the further right and privilege, in case said block shall ever be destroyed by fire, of building, on the premises immediately north of the premises hereby conveyed, a stairway, both in front and rear, suitable for the building or buildings to be erected or rebuilt on the premises hereby conveyed and next immediately north thereof, the center line of which said front and rear stairway (or cases) shall be exactly over and ⁴⁰⁴ upon the north line of the premises hereby conveyed, which front and rear stairways shall be built and perpetually maintained at the mutual and proportional expense of the party of the second part hereto and George M. Edison, his heirs, executors, administrators, and assigns; hereby conveying an easement to the said party of the second part hereto in the premises north of the premises hereby conveyed, for the purpose above stated, and reserving to the said George M. Edison, his heirs, executors, administrators, and assigns, a like easement and privilege in the premises hereby conveyed, upon a like contingency. Also, hereby quitclaiming to the party of the second part hereto, for all laudable and legitimate purposes, the free, perpetual, and uninterrupted use, for himself, family, friends, customers, and lessees, of the stairs and stairways now leading into the block of buildings known as the 'McReynolds Block,' in said city of Grand Rapids, both front and rear, and all other stairs and stairways accessible from what is called the 'rotunda' in said building or block, with a like perpetual use for a passageway and for light of said so-called 'rotunda' aforesaid, and the passageways thereto and therefrom, except such passageways as lead to the private apartments in said building or block as belong to the parties owning the premises north of the premises conveyed in this deed. Also, hereby conveying the privilege and right to hang, place, and suspend signs, pictures, etc., at the foot of said two flights of stairs hereinbefore mentioned—said right to hang and place pictures, signs, etc., to be used in such a manner as not to interfere with or obstruct the travel up and down said stairs—with a like right and privilege to suspend signs and pictures in the south half of said rotunda aforesaid in said building or block. Reserving to George M. Edison, his heirs, executors, administrators, and assigns, the right of use in common of the front entrance to the basement of said block, so that he, his lessees, his heirs, executors, and administrators, shall

and may have a right of access to pass to and from the basement of the store next north of the premises hereby conveyed, and known as 'No. 20 Canal street.' ”

After this deed was delivered, Mr. Ives took possession of the property, renting the first story as a store, and the upper rooms for offices, and for other purposes. When ⁴⁰⁵ this bill was filed, August 30, 1899, the one-fourth of the block next north of Mr. Ives was owned by the defendant Edison. The defendant May was a tenant of the Richmond estate, and occupied the north half of the first story as a double store. He also rented the store owned by Mr. Edison. He desired to take out the partition wall between this store and the double store then occupied by him, making one large room of the three stores, and to take out the center stairway, so that he would have but one entrance and a continuous front. He got the consent of Mr. Edison to remove the stairway from the center of the block, Mr. May proposing to put one somewhat narrower just adjoining the party-wall between Mr. Ives and Mr. Edison; the whole of it to be upon the property owned by Mr. Edison. He sought the consent of Mr. Ives, but the latter refused to give it. Mr. Ives learned that Mr. May proposed to remove the stairway after he had refused his consent to its removal, and filed this bill on the 30th of August, 1899, to prevent his tearing out the center stairway. After it was filed, Mr. Ives died, and Mrs. Ives is now his representative in the proceeding. December 30, 1899, after a hearing, the bill was dismissed, with costs against complainant. An appeal was promptly taken by complainant.

After the decree was entered in the court below, the defendant treated the case as though it was finally adjudicated in his favor, and, as appears from affidavits filed with the briefs, has torn out the center stairway entirely, and has put in the stairway as already indicated. The proof taken before the circuit judge was contradictory as to whether the proposed change would seriously injure the complainant or not. It is urged here that, while defendant may not have had the legal right to do what he has done, the change is a beneficial one to the complainant, and, in any event, has not done her such an irreparable injury as to entitle her to the aid of a court of chancery, and her relief, if any, is in a court at law: Citing *Woods v. Early*, 95 Va. 307, 28 S. E. 374; *Johnston v. Hyde*, ⁴⁰⁶ 32 N. J. Eq. 453; *McBryde v. Sayre*, 86 Ala. 458, 5 South. 791; *Trustees*

etc. *v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365; *Starkie v. Richmond*, 155 Mass. 188, 29 N. E. 770.

We do not place the same interpretation as do the solicitors for the defendants upon the case of *Woods v. Early*, 95 Va. 307, 28 S. E. 374. In that case an injunction was granted by the court. In the opinion the following language was used: "Mr. Justice Story says: 'Where easements or servitudes are annexed by grant or covenant, or otherwise, to private estates, . . . the due enjoyment of them will be protected against encroachments, by injunction': 2 Story's Equity Jurisprudence, sec. 927.

"It was said by Judge Burks in *Sanderlin v. Baxter*, 76 Va. 305: 'Damages in repeated suits would not compensate in such a case. The injury is irreparable, and calls for a preventive remedy, such as a court of equity only can furnish. That court constantly interposes by injunction where the injury is of that character. By the term "irreparable injury" it is not meant that there must be no physical possibility of repairing the injury. All that is meant is that the injury would be a grievous one, or at least a material one, and not adequately reparable in damages': See, also, *Kerr on Injunctions*, 199; *Manchester Cotton Mills v. Manchester*, 25 Gratt. 825, 828; *Switzer v. McCulloch*, 76 Va. 777; *Anderson v. Harvey*, 10 Gratt. 386, 398; *Rakes v. Manufacturing Co. (Va.)*, 22 S. E. 498, 499."

In *Johnston v. Hyde*, 32 N. J. Eq. 446, cited by the counsel, the court granted an injunction, and stated: "Mr. Johnston declares himself willing to put down through his grounds a culvert of such dimensions as the court shall direct. But without the consent of Mr. Hyde, and in the absence of any estoppel by acquiescence, the court cannot compel him to accept the substitution of a covered aqueduct for an open raceway."

In the notes to this case is a collection of authorities holding that the easement cannot be changed without the consent of both the parties interested, even though the change would be beneficial, and in nearly all of the cases ⁴⁰⁷ relief by injunction was granted: *Merritt v. Parker*, 1 N. J. L. 460; *Tillotson v. Smith*, 32 N. H. 90, 61 Am. Dec. 355; *Hulme v. Shreve*, 4 N. J. Eq. 116; *Dewey v. Bellows*, 9 N. H. 282; *Dickenson v. Grand Junction Canal Co.*, 15 Beav. 260.

In *McBryde v. Sayre*, 86 Ala. 458, 5 South. 791, it was made to appear that complainants had changed the use of the easement very materially from what it was when granted, and

that the change was harmful to the servient estate. The court, under the circumstances, declined to grant the writ of injunction, and left the parties to their remedy at law.

In the case of *Starkie v. Richmond*, 155 Mass. 188, 29 N. E. 770, the complainant did not move, after learning of the proposed trespass upon the passageway, until it was consummated by the erection of an expensive building. The court, under such circumstances, declined to interfere, but intimated pretty clearly that, if complainant had applied seasonably, the court would have compelled the moving of the building.

Counsel say the proposition is universally recognized that an injunction will be issued, in the discretion of the court, only when there is threatened an irreparable injury, or a continuing trespass or injury which cannot be compensated by damages in a suit at law, "and, in the exercise of this discretion, the court will examine into all the circumstances of the case, and if it is apparent that the relief sought is disproportionate to the nature and extent of the injury sustained, or likely to be," or "if the injunction will cost the defendant many times more loss than the complainant will suffer, the court will not interfere": Citing *Hall v. Rood*, 40 Mich. 46, 29 Am. Rep. 528; *Potter v. Saginaw etc. Street Ry. Co.*, 83 Mich. 297, 47 N. W. 217; *Bentley v. Root*, 19 R. I. 205, 32 Atl. 918; *Wood v. Sutcliffe*, 2 Sim., N. S., 163; *Chapin v. Brown*, 15 R. I. 579, 10 Atl. 639; *Varney v. Pope*, 60 Me. 192; *Welton v. Martin*, 7 Mo. 307; *McElroy v.* ⁴⁰⁸ *Globe*, 6 Ohio St. 187; 2 *Beach's Modern Equity Jurisprudence*, sec. 713, and other cases.

An examination of these cases will show that each of them differs in some essential particular from the case at bar. In some of them the easement was not a private one created by deed. In others the injured party, after knowledge of the proposed trespass, remained inactive, and allowed a large expenditure of money to be made before invoking the aid of the court. In each of them it was made to appear that it would be inequitable for the equity court to interfere. But what are the facts in this case? Mr. Ives bought a valuable piece of property, and, as a part of the purchase, he obtained an easement that he and his grantor regarded as essential for him to possess. In the same deed which conveyed to him the title in fee to the store, there was granted to him the easement. The deed was promptly recorded, thus giving notice to the world of what his rights were. He entered upon the use of the easement, and continued to use it for nearly thirteen years. The

defendant Edison joined in the deed to Mr. Ives, and received part of the consideration paid therefor. The defendant May knew what the rights of Mr. Ives were. He sought to obtain his consent to a relinquishment of his easement. Failing to obtain this, with the consent of Mr. Edison he determined to take away the easement of Mr. Ives, and substitute another in the place of it. Learning of his disposition to do this, the complainant invoked the aid of the court. While the case was awaiting a final determination, the defendant saw fit to ignore the rights of the complainant, and to ignore the legal proceedings, and proceeded to remove the stairway, and to substitute another in the place of it. To accomplish this wrong has cost the defendant a large sum of money; to restore the easement thus arbitrarily taken will cost another large sum of money; the aggregate of which sums is so large that it is now said it will be entirely disproportionate to the injury done the complainant, and for that reason the court should not grant relief. If such ⁴⁰⁹ a contention is to prevail, then indeed is the chancery court shorn of its power to protect persons in their right of property. If this doctrine is to be sanctioned, the person engaged in large enterprises may seize upon rights of less magnitude than his own, and, if an appeal is made to the law for protection, he may ignore the right of the injured and the pendency of the legal proceedings, and if he will put money enough into the new enterprise, before a final decree is entered, so that it will cost him much more to restore the right he has wrongfully taken than a jury may regard the right as worth, he may prevent the entering of any decree whatever against himself, and may mulct the person who has appealed to the courts to protect his rights in costs. This does not appeal to our sense of justice.

The easement possessed by the complainant was created by deed. It imposed a servitude upon Mr. Edison's land for the benefit of the estate of complainant, which, under the statute of frauds, could not be assigned, granted, or surrendered, unless by a writing or by operation of law: Washburn on Easements, 4th ed., 300. It was taken for granted by defendant May that he could not move this stairway without the permission of Mr. Edison, who was the owner in fee of one-half of it; but the title in fee was no more sacred than the easement held by the complainant, created by a deed for which payment had been made. It is difficult to avoid the conclusion that if the easement to which complainant is entitled

can be taken without her consent simply because defendant May will be benefited more than she will be damaged, for a like reason the title owned by Mr. Edison may be ignored. It is doubtless true that the parties ought to have been able to arrive at an amicable agreement; but, in the absence of such an agreement, the defendant had no more right to remove this stairway than he would have had to trespass upon any other portion of complainant's estate in such a way as to deprive her of its use, and then say to her that he had provided for her another estate just as valuable, and with ⁴¹⁰ which she should be satisfied. I know of no law which will justify such an invasion of the rights of property belonging to one person, to serve the convenience or necessities of another. It is the duty of the courts to protect persons in their right of property, even though the holdings may be small, instead of justifying a trespass, or compelling the owner of the property to accept something else in the place of it: *Gregory v. Nelson*, 41 Cal. 278; *Ritchey v. Welsh*, 149 Ind. 214, 48 N. E. 1031. In this case a definite agreement was made between the complainant and her grantors for the use of this easement in the place it was then located. It is for her to say whether the agreement shall be preserved in its integrity, and, before it can be changed, her consent must be obtained: *Dickenson v. Grand Junction Canal Co.*, 15 Beav. 271; *Hills v. Miller*, 3 Paige, 254, 24 Am. Dec. 218.

In the case of *Stock v. Jefferson*, 114 Mich. 357, 72 N. W. 132, the same argument was used that is urged by the solicitors for the defendants in this case. The court said: "It is the claim of the defendants that the loss to the complainant caused by the diversion of the water is trivial, while the damage the defendants would sustain if a permanent injunction is granted would be very great, and that therefore the injunction ought not to be allowed: Citing *Potter v. Saginaw etc. Street Ry.*, 83 Mich. 298, 47 N. W. 217, and cases there cited; *Torrey v. Camden etc. R. R. Co.*, 18 N. J. Eq. 293; 10 Am. & Eng. Ency. of Law, 799, and note; *Logansport v. Uhl*, 99 Ind. 539, 50 Am. Rep. 112. None of these authorities establish the doctrine that, where one trespassed against acts promptly after notice of the trespass, equity will not interfere, where the trespass is of a continuing nature and is irreparable in its character. An examination of these cases will show either that it was doubtful if any damage would be done, or the complainant had not acted promptly in appealing to equity. It does not appeal to

one's sense of justice to say that the exercise of a right possessed is not of as much benefit to the possessor as the taking of that right from the owner would be to the trespasser, and therefore the trespasser should be allowed to continue his ⁴¹¹ trespass. . . . The defendants knew the complainant was opposed to what they did. He forbade their acts, and, when they continued them, he caused a copy of a decree made more than forty years ago in favor of his grantors to be served upon them, and, when they paid no attention to all this, without unreasonable delay he appealed to the court. If they have expended considerable sums of money in committing this trespass, it is their own fault, and they must lose it. It is urged very earnestly by counsel that Mr. Stock's right to maintain his dam, and to use the water that would naturally come to his mill, must give way to the right of the public to improve the highways, to drain lands, and to generally improve the country. It is sufficient reply to this argument to say that it has long been the fundamental law of the land that a man is not to be deprived of his property without due process of law and without compensation": *Hall v. Ionia*, 38 Mich. 493; *Koopman v. Blodgett*, 70 Mich. 610, 14 Am. St. Rep. 527, 38 N. W. 649; *Haslett v. Shepherd*, 85 Mich. 165, 48 N. W. 533; *Lathrop v. Elsner*, 93 Mich. 599, 53 N. W. 791; *Walz v. Walz*, 101 Mich. 167, 59 N. W. 431; *Kent Furniture Mfg. Co. v. Long*, 111 Mich. 383, 69 N. W. 657; *Hall v. Nester*, 122 Mich. 141, 80 N. W. 982; 1 *High on Injunctions*, sec. 804; *Corning v. Troy Iron etc. Factory*, 40 N. Y. 191; *Jones on Easements*, sec. 218; *Gregory v. Nelson*, 41 Cal. 278; *Jaqui v. Johnson*, 27 N. J. Eq. 526; *Johnson v. Jaqui*, 27 N. J. Eq. 552; *Manning v. Port Reading R. R. Co.*, 54 N. J. Eq. 46, 33 Atl. 802; *Ritchey v. Welsh*, 149 Ind. 214, 48 N. E. 1031; *Washburn on Easements*, 4th ed., 300; 10 *Am. & Eng. Ency. of Law*, 2d ed., 429.

The circuit judge should have granted the injunction as prayed. It is doubtless true it will cost the defendant a good deal to restore to the complainant the easement as it existed when the suit was brought, but the defendant alone is to blame for the situation. All the work done in the removal of this stairway has been done since this proceeding was begun. The defendant preferred to act without waiting for the court to determine the controversy. In doing so he acted at his peril, and is justly ⁴¹² chargeable with the consequences. He should be required to restore the easement as it existed when this bill

was filed. A decree will be entered in accordance with this opinion, with costs of both courts.

Montgomery, C. J., and Grant, J., concurred with Moore, J.

MR. JUSTICE HOOKER dissented, and, speaking of the rights of the complainant, said: "Undoubtedly, she has a legal right to have the stairs maintained until the end of time, unless the building should be burned, in which case, under the terms of her contract, they could only be rebuilt at the place where the defendants have put them. No matter how great the inconvenience to the defendants, and how little she would be inconvenienced by the change, she may insist upon her 'pound of flesh.' To obtain it, however, she must go to a court of law, for it is not the province of a court of equity to grant injunctions to enforce strict legal rights of this character, when full compensation can be given in an action at law, and where the remedy by injunction would be a much greater hardship upon the defendants than the change would be to her. A number of cases sustain the proposition that an injunction is a matter of grace, not of right; that it issues only when irreparable injury is threatened, and never when there is a plain and adequate remedy at law.

"Again, a court of equity may deny such relief in any case where the injunction will bear with especial severity upon a defendant, while the complainant will be a comparatively light sufferer if it be denied, as the rules applicable to specific performance, to which this case is analogous, show: *McBryde v. Sayre*, 86 Ala. 458, 5 South. 791; *Trustees of Columbia College v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365; *Starkie v. Richmond*, 155 Mass. 188, 29 N. E. 770; *Clarke v. Clarke*, 1 Ch. App. Cas. 16; *Durell v. Pritchard*, 1 Ch. App. Cas. 251; *Edwards v. Allouez Min. Co.*, 38 Mich. 46, 31 Am. Rep. 301; *Hall v. Rood*, 40 Mich. 46, 29 Am. Rep. 528; *Potter v. Saginaw etc. Street Ry. Co.*, 83 Mich. 297, 47 N. W. 217; 3 *Pomeroy's Equity Jurisprudence*, sec. 1295, note. In the light of these cases, we cannot say that all invasions of easements are remedial by injunction. It is not the character of the act or motive, but the nature of the injury, that determines the right to injunctive relief. When we find that there is a plain and adequate remedy at law, the injunction should be denied, especially if to grant it would be to impose a disproportionate burden upon the defendant." Mr. Justice Long concurred in the dissenting opinion.

INJUNCTION.—AN EASEMENT may be protected by injunction: *Watertown v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80, and note; *Robeson v. Pittenger*, 2 N. J. Eq. 57, 32 Am. Dec. 412. But see *Hall v. Rood*, 40 Mich. 46, 29 Am. Rep. 528.

BOYER v. GRAND RAPIDS FIRE INSURANCE CO.

[124 Mich. 455, 83 N. W. 124.]

INSURANCE — FIRE — CONDITIONS—STORING EXPLOSIVES.—If a fire insurance policy provides that it shall become void if gasoline is kept, used, or allowed on the insured premises, the policy is avoided by temporarily storing a small quantity of gasoline to be used in a gasoline stove for cooking purposes.

INSURANCE — FIRE — CONDITIONS CONCERNING EXPLOSIVES — DESCRIPTION OF PREMISES.—A fire insurance policy on a three-story building described therein covers a one-story addition to such building adjoining to, connected therewith, and for a long time previously thereto used and occupied in connection therewith, so as to avoid the policy for the unauthorized storing of explosives in such addition.

INSURANCE — FIRE — FORFEITURES.—Statutes designed to prevent forfeitures of fire insurance policies by the violation of any condition of the policy, when such violation has been without prejudice to the insurer, do not apply to a loss occurring during a breach of the contract and while its terms were being violated to the prejudice of the insurer.

CONSTITUTIONAL LAW —TITLE OF STATUTE.—Statutes must not contain provisions contrary to, or not germane to, the subject matter indicated in the title; but the body of the statute need not contain all of the provisions it might contain under its title, to save it from being unconstitutional.

P. Doran and M. Brown, for the appellant.

Champlin & Stone, for the appellee.

456 MOORE, J. Prior to January 18, 1899, plaintiff owned a stock of goods in the city of Grand Rapids, upon which the defendant had a one thousand dollar policy of insurance, "the loss, if any, payable to George H. Reeder, trustee, as his interest may appear." The plaintiff desired to remove the stock to Holland, and the following indorsement was made upon the policy: "Permission is hereby granted to remove the insured property to the three-story, composition roof, brick building, occupied as a boot and shoe store, and situated at No. 72 East Eighth street, in the city of Holland, Michigan. Insurance to cease at the former and attach at the latter location from 12 o'clock noon on the eighteenth day of January, 1899."

The goods were at once removed to this location. The portion of the store in the three-story building was about twenty feet by fifty feet. Just back of this portion of the store was a one-story building about twenty feet by thirty feet, both

portions having been used for many years together as one store. Both portions of the building were rented by plaintiff for one rental price. In the partition was a large opening where there had been a door, and also an opening where there had been a window. Both portions of the building were occupied by the plaintiff, though the major portion of his goods was kept in the front portion. He had a rough door hung in the doorway, which fastened from the inside with a string. There was nothing in the opening made for a window.

The policy of insurance, among other conditions, contained the following: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, . . . or if the hazard be increased by any means within the control or knowledge of the insured, . . . or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises benzine, benzole, dynamite, ether, fireworks, ⁴⁵⁷ gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitroglycerin or other explosives, phosphorus, or petroleum, or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights, and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight, or at a distance not less than ten feet from artificial light); . . . provided, a loss shall occur in the property insured while such breach of condition continues, or such breach of condition is the primary or contributory cause of the loss." The policy contained no agreement indorsed thereon or added thereto varying in any respect the printed conditions as above set forth.

It is the claim of plaintiff that in March he and his clerk, Mr. Mensching, hired a room over the store, where they intended to live, and to get their own breakfasts over a gasoline stove; that he ordered a gasoline stove, which was to be delivered to him soon thereafter, and, for the purpose of supplying this stove with fuel, he bought a gallon of gasoline, which was put in a one-gallon can, and for the purpose of lighting the store he bought five gallons of kerosene oil. The oil and gasoline were delivered to him on Monday, and placed by him in the rear portion of the store. Prior to Monday, Mr. Mensching entered into other employment, and Mrs. Stewart was hired to take his place in the store. She worked on

Monday and Tuesday. It is the claim of the plaintiff that on Monday noon, when his clerk was gone to dinner, he used about one quart of the gasoline to remove some spots from the clothing which he wore. On Tuesday evening Mr. Boyer gave a key to the store to Mrs. Stewart, and told her she would have to open the store in the morning, as he was going to Grand Rapids that evening, and would not return in time to open the store in the morning. About 11 o'clock at night the store was discovered to be on fire. About the time the fire was discovered one of the front windows was thrown forward into the 45th street as by an explosion. This was quickly followed by an explosion which threw the other front window into the street. The fire was then burning in the front portion of the store with great intensity. The firemen soon arrived and quickly extinguished the blaze. The goods in the front portion of the store were so badly injured as to constitute a total loss. The goods in the rear portion of the building were not injured by the fire, and there was but little fire in that portion of the building. The firemen entered the rear portion of the building from the rear. They found the oil and gasoline cans near the middle of the rear portion of the building. The oil can was about half full of oil. The gasoline can was empty. The cover to the gasoline can, which screwed on, was gone, and it was claimed it was later found in the front end of the store, under a pile of partly burned goods. Mr. Boyer did not go to Grand Rapids as he expected; he says because he was not feeling well, and because he thought Mrs. Stewart might have trouble in opening up the store; and he denied that he had any knowledge of the fire, or of what caused it, until the morning after the fire. The insurance company refused to pay the insurance, claiming that the conditions of the policy had been violated by allowing gasoline upon the premises without the written consent of the company, and also claiming the plaintiff was responsible for the burning of the building.

Upon the trial, after all the testimony was in, the circuit judge directed the jury to render a verdict for the defendant, upon the theory that the policy was void because plaintiff violated its conditions by allowing gasoline upon the premises. It is claimed by plaintiff that "forfeitures are not favored in the law; that to enforce the condition in the policy in suit, it is the duty of the defendant to show some substantial violation of the condition; it must not only show a violation, but it must show a violation of the very words of the condition, and,

as before stated, such violation must be substantial, and not merely technical, fictitious, or imaginary": Citing *Bates v. Detroit Mut. Ben. Assn.*, 51 Mich. 587, 17 N. W. 67. It is said that having gasoline in the back portion of the building temporarily was not such a violation of the conditions of the policy as to make it void: Citing *Hynds v. Schenectady County etc. Ins. Co.*, 11 N. Y. 554; *Williams v. Firemen's Fund Ins. Co.*, 54 N. Y. 569, 13 Am. Rep. 620; *Smith v. German Ins. Co.*, 107 Mich. 270, 65 N. W. 236, and other cases.

It is insisted the last-named case should decide this one in favor of plaintiff. We cannot agree with counsel in that contention. In the last-named case the gasoline was in the building for the purpose of being used by the painters when they were making ordinary and usual repairs to the building by painting it where it needed painting. The court discussed the questions involved at length, citing many authorities, and held, in substance, that the making of ordinary repairs, in a reasonable way, even though it increased the risk while the work was going on, and even though an article was used in the work the use of which in the business carried on in the building was prohibited by the policy, would not avoid the policy; that if the use of naphtha at the time and in the manner in which it was used was reasonable and proper in the repair of the building, having reference to the danger from fire as well as to other considerations, it would not render the policy void, but the question was a proper one for the jury. The case proceeded upon the theory that it was in the contemplation of the parties that the insured building should be kept in repair, and that what it was reasonably necessary to do to accomplish that purpose would not avoid the policy. But there can be no such claim made here. It is a well-known fact that gasoline is a dangerous article to have in and about a building. The parties had a right to contract that it should not be allowed upon the premises without the written consent of the company. They made such a contract. Gasoline was brought upon the premises, not for the purpose of being used in a reasonable way for necessary repairs, but, according to the version of the plaintiff, for the purpose of using it in a gasoline stove in an upstairs ⁴⁶⁰ room, having no direct connection with the store, but reached from an outside stairway. Would it be claimed that a gasoline stove could be used without the consent of the company, and that its use would not invalidate the policy? If not, could the keeping of gasoline be allowed on the prem-

ises for the purpose of using it in a stove without the consent of the company, and the policy remain good? If so, how much might be kept, and for how long? It seems to me to ask these questions is to answer them against the claim of the plaintiff. The language of the contract is plain and unambiguous, and the parties are bound by it: *Vandervolgen v. Manchester Fire Assur. Co.*, 123 Mich. 291, 82 N. W. 46; *Imperial Fire Ins. Co. v. County of Coos*, 151 U. S. 462, 14 Sup. Ct. Rep. 379; *London etc. Ins. Co. v. Fischer*, 92 Fed. 500; *Liverpool etc. Ins. Co. v. Gunther*, 116 U. S. 113, 6 Sup. Ct. Rep. 306; *Ostrander on Fire Insurance*, 2d ed., sec. 25; 1 *Wood on Fire Insurance*, sec. 58. The other cases cited by counsel are easily distinguished from this one.

It is claimed by counsel that the goods which were insured were in the three-story, composition roof, brick building, while the gasoline was in the one-story building, and did not come within the prohibition of the policy. We think this too technical. Permission was given to remove the insured property to the three-story, composition roof, brick building, occupied as a boot and shoe store, and situated at No. 72 East Eighth street. When this permission was granted, No. 72 included the rear portion of this store as well as the front portion. Both portions had been occupied for a long time as one store. When the three-story building was erected, there was a door five feet wide and a window three feet wide in the rear partition thereof. When the one-story addition was built, the window sash and the door were removed, and both portions of the room for many years were used as No. 72 East Eighth street, and were so used by the plaintiff when the fire occurred. Some of his stock of goods were there. It is true a rough door had been put in the ⁴⁶¹ doorway, which fastened with a string upon the inside, but both portions were used as one place of business.

It is said there is no evidence in the case tending to show that the gasoline was the cause of the fire; that the fact that the rear portion of the store did not burn is conclusive that the gasoline in no way contributed to the loss; and that the statute of 1897 (2 Comp. Laws 1897, secs. 5180, 5182) was designed to prevent the forfeiture of fire insurance policies by the violation of any condition of the policy, when such violation has been without prejudice to the insurer, as is indicated by its title; and that, if we are guided by the title of the

act, this case comes within it. It is said any other limitations in the body of the act are unauthorized and void, because in conflict with section 20 of article 4 of the constitution. It is also said the act, with these limitations left out, is complete, and therefore valid. It is true the body of an act must not, under our constitution, contain provisions contrary to, or not germane to, the subject matter indicated in the title; but we do not understand the body of the act must contain all the provisions it might contain under the title to save the act from being unconstitutional. The body of the act contains no provisions not germane to the subject indicated by the title, and not authorized by it. In the absence of the statute, it is clear a breach of the contract of insurance would avoid the policy: *Shelden v. Michigan etc. Ins. Co.*, 124 Mich. 303, 82 N. W. 1068. The statute of 1897, by its terms, does not take this case out of that rule. The loss occurred during a breach of the contract, and while its terms were being violated. The statute does not provide that under such circumstances the policy shall be valid.

Judgment is affirmed.

The other justices concurred.

INSURANCE—PROHIBITED ARTICLES.—The use by an assured of naphtha or benzine on the insured premises, when the use or keeping of such articles is stipulated against in the policy, avoids the contract of insurance, unless such use is incidental to the business, or is in small quantities for a special and not dangerous purpose: *Wheeler v. Traders' Ins. Co.*, 62 N. H. 450, 13 Am. St. Rep. 582; *Badger v. Platts*, 68 N. H. 222, 73 Am. St. Rep. 572, 44 Atl. 296. The keeping of prohibited articles as merchandise for sale in the usual course of business does not invalidate such a policy: *Phenix Ins. Co. v. Walters*, 24 Ind. App. 87, 79 Am. St. Rep. 257, 56 N. E. 257.

TITLE OF STATUTE.—THE SUFFICIENCY of titles to statutes within the constitutional requirements is discussed at length in the monographic notes to *Crookston v. County Commrs.*, 79 Am. St. Rep. 456-486; *Bobel v. People*, 64 Am. St. Rep. 70-107.

COWIN v. HURST.

[124 Mich. 545, 83 N. W. 274.]

BENEFICIAL ASSOCIATIONS—TRUST IN FAVOR OF BENEFICIARY.—If a member of a beneficial association desiring to make his son in law his beneficiary, which being prohibited by the articles of the association, he, with its consent, makes his niece his beneficiary, with her written agreement that upon receipt of the benefit fund she will pay it over to such son in law, she may be compelled to carry out the terms of the trust. No one but the association can contest its validity.

One W. Maxted being a member of a lodge of the Ancient Order of United Workmen up to the time of his death, his beneficiary was entitled at that time to receive the sum of two thousand dollars. Maxted during his lifetime desired to make his son in law, Mr. Cowin, his beneficiary, but this being prohibited by the articles of the association, as he was not a blood relative, Maxted, with the consent of the association, named his niece, the defendant, as his beneficiary, taking her written agreement that upon his death and the receipt of the benefit fund she would pay it to Mr. Cowin. Upon the receipt of the draft for the money she refused to carry out the agreement. This action was brought by Cowin to prevent her, by injunction, from collecting the benefit fund, and after judgment for the complainant the defendant appealed.

Chaddock & Scully and A. B. Morse, for the appellant.

E. J. Bowman and N. O. Griswold, for the appellee.

546 GRANT, J. The claim of the defendant is that because Mr. Cowin had no insurable interest in Mr. Maxted's life, and could not be made a beneficiary, therefore the contract between complainant and defendant is void, as against public policy, and that the courts will not afford relief. This position ignores another legal and equitable rule—that a trustee **547** cannot be heard to say: "I will not carry out the trust, because the parties had no legal right to repose the trust in me." The Ancient Order of United Workmen is not here complaining. If it were, a different question would arise. There was no attempt to defraud the association. It was fully informed of the situation, and, after being so informed, consented to pay over the money. Upon what principle of justice or equity can the trustee be heard to say: "I will profit to the full extent of the

money placed in my hands by the consent of all parties, although one of them might, if it chose, contest its legality?" If the association had issued a certificate to the defendant, and provided therein that she should hold the money in trust to pay his creditors, the certificate would be void, if the association saw fit to make that defense; but if the association should choose to waive such defense, and pay over the money to the trustee, neither law nor equity would permit the trustee to profit by the transaction, and keep the money. The rule is settled against the defendant by numerous authorities: *Peek v. Peek*, 101 Ky. 423, 41 S. W. 434; *Remington v. Ward*, 78 Wis. 539, 47 N. W. 659; *Gilmore v. Roberts*, 79 Wis. 450, 48 N. W. 522; *Wells v. McGeoch*, 71 Wis. 196, 35 N. W. 769; *Hurd v. Doty*, 86 Wis. 1, 56 N. W. 371; *Standard Life etc. Ins. Co. v. Catlin*, 106 Mich. 138, 63 N. W. 897; *Hosmer v. Welch*, 107 Mich. 474, 65 N. W. 280, 67 N. W. 504; *Woodruff v. Tillman*, 112 Mich. 188, 70 N. W. 420. The sole parties concerned in the validity of this transaction are Mr. Cowin and the association. If they are satisfied, it does not lie in the mouth of the defendant to complain. She has no equities. She paid nothing. Mr. Cowin parted with his interest in the homestead, worth six hundred dollars, in consideration of making this agreement, and besides paid Mr. Maxted's assessments for several years.

The decree is affirmed, with costs.

The other justices concurred.

MUTUAL BENEFIT INSURANCE.—For features of the law especially applicable to mutual or membership life or accident insurance, see the extended note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 543-579.

RENAUD v. STATE COURT OF MEDIATION AND ARBITRATION.

[124 Mich. 648, 83 N. W. 620.]

CONSTITUTIONAL LAW—COURTS OF ARBITRATION.—

The creation of a state court of mediation and arbitration for the amicable adjustment of differences between employers and employes in certain cases is authorized by a constitutional provision that the legislature may establish courts of conciliation, with such powers and duties as may be prescribed by law.

CONSTITUTIONAL LAW—OFFICE, APPOINTMENT, INSTEAD OF ELECTION.—Under a constitution authorizing the establishment of courts of conciliation, the legislature may provide for the appointment of the members of the court, instead of requiring their election by the people.

COURTS OF MEDIATION AND ARBITRATION DO NOT POSSESS POWER TO GRANT REHEARINGS, unless the statute creating them contains a grant of such power.

COURTS OF MEDIATION AND ARBITRATION.—WRIT OF MANDAMUS OR PROHIBITION MAY ISSUE to vacate or stay further proceedings under a void order for a rehearing issued by a state court of mediation and arbitration in a case already decided by it.

COURTS OF MEDIATION AND ARBITRATION—RIGHT OF APPEAL FROM DECISIONS OF.—Unless the statute creating a court of mediation and arbitration expressly or by plain implication provides for an appeal from its decisions, no appeal can be taken.

J. H. Pound and G. F. Monaghan, for the relators.

Bowen, Douglas & Whiting, for the respondent.

⁶⁴⁸ MOORE, J. Pingree & Smith are engaged in the business of manufacturing boots and shoes in the city of Detroit, and have a good many men and women in their ⁶⁴⁹ employ. Prior to December 16, 1899, differences arose between the employers and employed over the scale of wages. December 16, 1899, an agreement was signed by Pingree & Smith, on the one side, and Timothy O'Connor and Ernest A. Allen, on the other side, representing the employed, reading in its material part as follows: "Being unable to agree on prices of the following work, we hereby jointly request an arbitration of the same by your honorable board, agreeing to abide by your decision. Prices to remain in force until May 1, 1900."

A hearing was had before the court. The taking of testimony was completed March 9, 1900, and the case was argued by the counsel for the respective parties. On March 31st the

court made a decision in writing, and filed the same in the office of the county clerk of Wayne county April 19, 1900. Pingree & Smith were dissatisfied with the decision of the court, and on April 6th moved for a rehearing of the case. June 23, 1900, the court granted the motion for a rehearing. The relators ask for a writ of prohibition or a writ of mandamus, or other appropriate writ, to prevent the respondent from rehearing the controversy.

It is the claim of the relators that, when the court rendered its decision, it exhausted its powers, and had no authority to grant a rehearing. Three questions are involved in this proceeding: 1. The existence of the court of mediation and arbitration; 2. Its power to grant a rehearing after it has once decided a controversy submitted to it; 3. Have the relators sought a proper remedy?

The existence of the court is attacked by the attorneys who argue the case and submit briefs in the interest of Pingree & Smith upon constitutional grounds. We cannot state their position more clearly than by quoting from brief of counsel: "The act under which this court of mediation and arbitration was organized is unconstitutional. By section 1 of ⁶⁵⁰ article 6 of the constitution, the judicial power is vested in one supreme court, in circuit courts, in probate courts, and in justices of the peace. Municipal courts of civil and criminal jurisdiction may be established by the legislature in cities. By section 23 of article 6, the legislature may establish courts of conciliation, with such powers and duties as shall be prescribed by law. The general scheme of the constitution, as far as it relates to judicial officers, is for their election, and not for their appointment, as shown by article 12, which provides for impeachments and removals from office. Section 4 of that article provides that no judicial officer shall exercise his office, after an impeachment is directed, until he is acquitted; and section 5 of that article provides that the governor may make a provisional appointment to fill a vacancy occasioned by the suspension of an officer, until he shall be acquitted, or until after the election and qualification of his successor: *Chandler v. Nash*, 5 Mich. 409. Section 23, article 6, of the constitution provides for the establishment of courts of conciliation; and by 'courts' here, as well as elsewhere in the constitution, is meant a permanent organization for the administration of justice, and not a special tribunal provided for by law, that is occasionally called into existence by particular exigencies, and that ceases to exist with

such exigency: *Streeter v. Paton*, 7 Mich. 341; *Shurbun v. Hooper*, 40 Mich. 503; *Risser v. Hoyt*, 53 Mich. 185, 18 N. W. 611. If the administration of justice embraces the enforcement of the orders or decrees of courts, the court of mediation and arbitration, being deficient in authority given by the legislature to do this, is not such a court as is meant by section 23 of article 6; for, by the act of its creation, it can do nothing but render a decision on subjects submitted to it in a particular way, and file its decision with the county clerk. The constitution provides for the formation of a court of conciliation, while the act provides for the establishment of courts of mediation and arbitration, which are not courts of conciliation. . . . Under the act there is no authority given to the judges or members of the court to compel the appearance of either party, nor is there any method of composing the differences or questions in dispute by turning over the parties to a court with authority to enforce its decrees. From the terms of the act it is clear that whoever drafted it had in mind the definition given above of 'arbitration,' ⁶⁵¹ which, as that definition says, usually implies a tribunal without power to compel attendance."

It is true that as to the members of the supreme court, the circuit judges, judges of probate, and justices of the peace, the constitution provides that they shall be elected; but we think it is not open to question that, if the constitution did not require these judicial officers to be elected, but authorized the legislature to establish these courts and prescribe their powers and duties, it would be entirely competent for the legislature to do so. This is just what is done by section 23, article 6, of the constitution. The act does not fail because the legislature, in creating the court, did not provide its members should be elected.

We are, then, confronted with the question, Is the court of mediation and arbitration a court of conciliation? When the constitutional convention met which framed our present constitution, in 1850, courts of conciliation had been in practical operation in Norway for more than fifty years. They had accomplished most excellent results in the way of harmonizing differences between parties who were otherwise likely to resort to litigation. The purpose of these courts was to create an inexpensive and speedy tribunal, before whom parties between whom differences had arisen in civil cases must go before resorting to the courts of law for relief. The parties were required to appear personally and without counsel, and state their differences, and present such proofs as they could in sup-

port of their respective claims. It was the duty of the court to advise with the parties, and, if possible, to bring about an amicable settlement of their differences, and have them depart as friends, and not enemies. If an amicable settlement was agreed upon, a judgment was entered, which would have the same effect as a judgment in any court. As these courts were first constituted, if the parties did not agree upon an amicable settlement they were left to their remedy in the courts of law; but, as we shall see later, further powers were afterward conferred upon them.

⁶⁵² Interesting descriptions of courts of conciliation are to be found in 68 *Atlantic Monthly*, 402, and 72 *Atlantic Monthly*, 671. Courts of a like character had also been in operation with most satisfactory results in France and Sweden, and possibly in some other countries of Europe. It is possible that, because of the results attained by these inexpensive and speedy tribunals, the framers of the constitution were led to incorporate in it section 23, article 6, which reads: "The legislature may establish courts of conciliation, with such powers and duties as shall be prescribed by law." This language is simple and clear, and would seem to give the legislature abundant authority to create courts of conciliation, and to clothe them with as little or as great power as to the legislature seemed proper. At an address made at Michigan's semi-centennial celebration, Justice Campbell called attention to this constitutional provision. He had no doubt of the authority of the legislature to create these courts, and expressed regret that the legislature had not brought them into existence. In 1889 an act was passed by the legislature entitled "An act to provide for the amicable adjustment of grievances and disputes that may arise between employers and employés, and to authorize the creation of a state court of mediation and arbitration." The act is a brief one, containing but ten sections, and is very general in its provisions: 1 *Comp. Laws* 1897, secs. 559-568. It is in marked contrast with the edicts or statutes calling these courts into existence in some of the countries of the old world. The Norwegian law of 1824 relating to courts of conciliation is a carefully drawn statute of eighty-seven sections. It has been amended at various times. In 1869 the functions of this tribunal were considerably enlarged. These courts were primarily instituted for the purpose of being peacemakers in civil causes, and had no authority to enter judgment, except

by the consent of the parties. As a rule, resort must be had to them in civil cases before the aid of the law courts could be invoked. By the later amendments, in case the parties do not agree to an amicable settlement ⁶⁵³ after listening to the advice of the court, the court is authorized, by the consent of the parties, to arbitrate the differences between them, and in cases involving small amounts, may adjudicate the controversy at the request of either party.

In the decision of this case we are not aided by precedents. The constitution of the state of Louisiana makes it the duty of the general assembly "to pass such laws as may be proper and necessary to decide differences by arbitration": Const., art. 165. A law was passed calling into existence a board of arbitration, conferring upon it powers of a very similar character to those with which the court of mediation and arbitration is clothed. The action of this board was invoked in a matter of difference arising between the employés of a railroad company and their employer. The railroad company sought to have the board of arbitration enjoined from proceeding with the hearing. This the court refused to do. In disposing of the case, it used the following language: "It is in place here to state that the board is not vested with judicial functions. It sits as a court of conciliation with the authority to formulate a decision and to have it recorded": *New Orleans etc. Ry. Co. v. Board of Arbitration*, 47 La. Ann. 879, 17 South. 418.

It is to be regretted that the law passed by the legislature is not a more perfect one, but we think it very clear that the power conferred upon the respondent, if exercised, is calculated to bring about conciliations between those employers and employed between whom differences have arisen, and that the law was enacted, as suggested by its title, to provide for the amicable adjustment of grievances and disputes that may arise between employers and employed. The act does not apply to all classes of cases, and the aid of this tribunal is not a prerequisite before bringing an action in a court of law, as is required in Norway and in some other countries, but the provisions of the act are intended to bring about amicable adjustments of differences. We are not concerned with the ⁶⁵⁴ extent of the power conferred by the legislature upon this court, nor with the effect of its decisions. Those are questions we reserve until they are properly before us. The act does not undertake to confer power or impose duties in relation to all

classes of civil cases, but such power as it does confer is within the constitutional right of the legislature.

We now come to the second question: Has the court a right to grant a rehearing after it has once rendered its decision? From what has already been said, it is apparent that the purpose to be served by the establishment of this court is to have a speedy and inexpensive disposition of the differences submitted to it. It was not the purpose of the legislature to create what we ordinarily understand by a court of law. The constitution provides that these courts shall have such powers and duties as shall be prescribed by law. The law which called this court into existence is the limit of its power. The act nowhere authorizes the court to grant a rehearing. When its decision has been rendered and filed, it has exhausted its power in a given case. Some question is raised by counsel as to the effect of the decision rendered by the court, and the method of its enforcement; but we do not regard that question as properly before us in this proceeding, and do not pass upon it.

We now come to the final question: Have the relators sought a proper remedy? We have already stated that the court had no authority to act further in the proceeding. The statute does not provide for an appeal from the action of the court of mediation and arbitration. It has been repeatedly held that, unless the statute expressly or by plain implication provides for an appeal, none can be taken: See *Sullivan v. Haug*, 82 Mich. 555, 46 N. W. 795, and the many cases there cited. Section 191 of 1 Compiled Laws of 1897 provides when the supreme court shall have general superintending control over all inferior courts, and for the issuance of various writs—among them, writs of prohibition and writs of ⁶⁵⁵ mandamus. Section 9977 of 3 Compiled Laws of 1897 provides when writs of prohibition shall issue. This section of the statute was construed in *Maclean v. Wayne Circuit Judge*, 52 Mich. 257, 18 N. W. 396. In that case a mandamus was ordered to vacate a restraining order improperly made, and a writ of prohibition was ordered to stay further proceedings in a case where the court attempted to exercise jurisdiction improperly: See, also, 2 *Green's Practice*, 827, and the cases there cited. The writ of mandamus will be granted, to vacate the order granting a rehearing, and the writ of prohibition, staying any further proceedings in the cause by the respondent.

The other justices concurred.

ARBITRATION.—On the submission of controversies to arbitration in general, see the monographic notes to Commercial Union Assur. Co. v. Hocking, 2 Am. St. Rep. 566-572; Nettleton v. Gridley, 56 Am. Dec. 381-385; Elmendorf v. Harris, 35 Am. Dec. 591-594.

PEOPLE v. BERRIEN CIRCUIT JUDGE.

[124 Mich. 664, 83 N. W. 594.]

CONSTITUTIONAL LAW — CLASS LEGISLATION — EX-ACTING A LICENSE AND BOND FROM COMMISSION MEN.—A statute requiring merchants who sell farm produce upon commission to execute a penal bond conditioned for the faithful performance of their contracts, and to pay a license fee, is unconstitutional, as being class legislation, and as an unjustifiable interference with the right of the citizen to carry on legitimate business.

Mandamus to vacate an order quashing an information against one Valentine under the statute mentioned in the opinion.

G. M. Valentine, in propria persona.

Hammond & Hammond, for the respondent.

668 GRANT, J. Acts of this character, when valid, must find a reason for their existence in the police power of the state. The act is not aimed at brokers, in the ordinary meaning of that word. It is not aimed at commission merchants generally. It is aimed solely at commission merchants who engage in the business of selling farm produce for producers upon commission. It provides that such a merchant shall pay a fee and execute a bond, as conditions precedent to doing business. The condition of the bond is the honest and faithful performance of his contracts. The business of buying and selling on commission has existed ever since commerce began. There are, and always have been, dishonest men engaged in it, as there are, and always have been, in every other branch of business. There are, and always have been, dishonest sellers, who will pack their produce in such a manner as to deceive. It would be as reasonable to require the latter to give bond to properly pack their produce. In every such case the common law provides an ample remedy for redress to the injured party for breach of contract. There is no more reason why a commission merchant should pay a license fee, and execute a bond

to pay his debts and to do his business honestly, than there is that any other merchant should pay a like fee, and file a like bond to properly do his business and pay his debts. The business requires no regulation, any more than any other mercantile pursuit. There is nothing in it hostile to the comfort, health, morals, or even convenience of a community. It is carried on by private persons in private buildings, and in a manner no different from that in which the merchant selling hardware or groceries or drygoods carries on his business. The law can find no support in the police power inherent in the state. It is not like the liquor traffic, which, under the decisions of every court, is subject to the police power, ⁶⁶⁷ because of the injury it does to the health, morals, and peace of the community, and may be prohibited altogether. Neither is there anything in it requiring regulation, as do hack-drivers, peddlers, keepers of pawnshops, and the like. The legislature of this state is not empowered by the constitution to regulate contracts between its citizens who are engaged in legitimate commercial business, or to require any class of persons to pay a fee for the right to carry on business, or to give a bond to perform their contracts which other parties may choose to make with them. The constitution guarantees to citizens the right to engage in lawful business, unhampered by legislative restrictions, where no restrictions are required for the protection of the public. We are compelled to hold this law void, because: 1. It is class legislation; and 2. It is an unjustifiable interference with the right of citizens to carry on legitimate business.

It is unnecessary to discuss the other questions raised. The writ is denied.

The other justices concurred.

CONSTITUTIONAL LAW — REGULATION OF BUSINESS.—A Minnesota statute requiring commission merchants to give a bond to the state for the benefit of their consignors, and prescribing a penalty for a violation of the provisions of the act, has been upheld as constitutional: See *State v. Wagener*, 77 Minn. 483, 77 Am. St. Rep. 681, 80 N. W. 633, 778, 1134.

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MICHIGAN SUGAR COMPANY v. AUDITOR GENERAL.

[124 Mich. 674, 83 N. W. 625.]

CONSTITUTIONAL LAW—BOUNTIES.—A statute providing for the payment of bounties to manufacturers in the state of sugar from beets grown therein is unconstitutional as authorizing taxation for a private purpose.

CONSTITUTIONAL LAW.—UNCONSTITUTIONAL STATUTES LACK THE FORCE OF LAW, and are of no more saving effect to justify action under them than as though they had never been enacted.

CONSTITUTIONAL LAW—BOUNTIES.—If a statute providing for the payment of certain bounties is unconstitutional, a subsequent statute making an appropriation to pay such bounties as earned is also unconstitutional and cannot be enforced.

Mandamus to compel the issuance of a warrant for the payment of a sugar bounty.

T. A. E. & J. C. Weadock and H. H. Hatch, for the relator.

H. M. Oren, attorney general, and C. D. Joslyn, for the respondent.

675 LONG, J. In 1897 the legislature of this state passed an act, entitled "An act to provide for the encouragement of the manufacture of beet sugar, and to provide a compensation therefor, and to make an appropriation therefor": Act No. 48, Pub. Acts 1897.

Section 1 provides: "There shall be paid out of the state treasury to any person, firm, or corporation engaged in the manufacture, in the state of Michigan, of sugar from sugar beets grown in the state of Michigan, one cent per pound upon each and every pound of sugar so manufactured, under the conditions and restrictions hereinafter provided."

Section 2 provides: "No money shall be paid for sugar so manufactured unless such sugar shall have been so manufactured in this state, and from beets grown in the state of Michigan, and unless such sugar shall contain at least ninety per cent crystallized sugar, and the manufacturer shall produce good and sufficient receipts and vouchers to show that at least four dollars per ton of two thousand pounds has actually been paid for all beets purchased containing twelve per cent of sugar, said twelve per cent being the basis for valuation of the purchase price of four dollars per ton. The quantity and qual-

ity of sugar upon which all of said bounty is claimed shall be determined by the commissioner of the state land office, with whom all claimants shall from time to time file verified statements showing the quantity and quality of sugar so manufactured by them, the price paid the producer for the beets actually produced in this state, upon which said bounty is claimed."

Section 3 provides: "The persons, firms, or corporations so intending to ⁶⁷⁶ engage in the manufacture of beet sugar in this state shall, before commencing the same, file a statement with the commissioner of the state land office, setting forth their proposed undertaking, the capacity of their manufactory, the number of tons of beets they intend to manufacture per annum, and request said commissioner of the state land office to appoint a suitable weighman and inspector, as hereinafter provided."

Sections 4 and 5 provide that the commissioner of the state land office shall appoint a weighman and inspector to keep an accurate account of the sugar manufactured and the kind and character of the beets furnished; and also provide that the person, firm, or corporation buying the beets and manufacturing the sugar shall, in order to obtain the bounty provided by the act, pay to the seller of the beets at least four dollars per ton for beets containing twelve per cent of sugar and a sum proportionate to that amount for beets containing a greater or less per cent of sugar.

Section 6 provides: "When any claim arising under this act is filed, verified, and approved by the commissioner of the state land office, as hereinafter provided, he shall verify the same to the auditor general of the state, who shall draw a warrant upon the state treasurer for the amount thereof, payable to the person, firm, or corporation to whom said sum or sums are due."

The act appropriated the sum of ten thousand dollars for the years 1897 and 1898, and provided that, if the bounty should exceed that amount, the deficit should be paid from the general fund.

In 1899 the legislature passed Act No. 263, entitled "An act to provide a tax to meet the several appropriations for which a tax is not otherwise provided, for the general expenses of the state government, salaries of the state officers, expenses of the state departments, and expenses of the legislature for the years 1899 and 1900."

Section 2 of this act provides: "The several sums appropriated by the provisions of ⁶⁷⁷ any act to meet which this act

provides a tax shall, so far as moneys are required to be paid to the boards or officers of any institution or commission, be paid out of the general fund in the state treasury to the proper board or officer, at such times and in such amounts as the general accounting laws of the state prescribe, and the disbursing officer of such board or commission shall render his accounts to the auditor general thereunder."

It is claimed that, while this last act does not, in terms, provide for an appropriation of any moneys to pay the bounty on beet sugar manufactured, yet it was the intent of the legislature to provide by the act for such bounty, as a committee of the house of representatives caused a statement to be made showing the different amounts necessary to be raised, and it is claimed that in this statement was an estimate of an excess of bounty over the tax previously raised, amounting to forty-two thousand seven hundred and fourteen dollars and six cents, and a further estimate of the amounts needed for the years 1899 and 1900 of fifty thousand dollars and one hundred and fifty thousand dollars, respectively. On the other hand, it is claimed by the respondent that under date of December 2 and 29, 1898, the relator presented its claim for bounty earned, amounting to twenty-eight thousand four hundred and fifty-one dollars and seven cents, which presumably covered all claims to the end of the year 1898; and that no specific appropriation was made by the act of 1899, nor any taxes levied, for such bounty. Relator claims that there is due it for such bounties the sum of twenty-four thousand two hundred and sixty-two dollars and ninety-nine cents. The accounts were presented to the auditor general by the relator for such amount, and payment was refused.

It appears that the relator is a corporation organized under the laws of the state, with a capital stock of two hundred thousand dollars, and that it has fully complied with all the provisions of the act of 1897 to be entitled to the bounty provided by that act. But two questions are raised: 1. It is claimed that there is no money in the state treasury with which to pay the bounty claimed, as the act of 1899 made no appropriation for it, and therefore the respondent properly refused to draw a warrant for the same; while, on the other hand, it is claimed by relator that an appropriation ⁶⁷⁸ was made, and that though the act of 1897 be found unconstitutional and void, the relator is entitled to have the bounty paid, as the legislature has recognized by the act of 1899 the right of the relator to have the

bounties earned under the act of 1897; 2. It is claimed by respondent that the act of 1897 is unconstitutional.

We will discuss the last proposition first. This taxation is for no such public purpose that it can be upheld. There is no power in the state to authorize a tax for private purposes. Taxes can be levied only for public purposes, to accomplish some government end. The legislature is the mere creature of an organic law, deriving all its power from the constitution. Its power within those limits must be admitted to be plenary, except so far as otherwise specifically limited; but, outside those limits, it is as powerless as if specifically prohibited. It cannot take the property of A and give it to B, nor can it tax it for the benefit of B. Here is a private corporation now calling upon the state for a sum of money to aid it in carrying on a private business, most of which money, if paid, must come out of the pockets of people who are not engaged in that business, and who have no interest in it. It is claimed by the relator that this is not a gift to the relator, but that it would not have engaged in the business but for this act of the legislature; that, in reliance upon the act, it built a plant at large expense, and that it complied with the provisions of the act requiring it to pay to the producers of beets at the rate of four dollars per ton; and that, therefore, the honor and integrity of the state are involved. So the honor and integrity of the state might become involved under any other act, however unconstitutional, which the legislature might see fit to pass. What may have brought about the passage of the act of 1897 we need not discuss, the only question being whether it is within the legislative power. We need not point out specifically any particular provision of the constitution which it violates. It is void whether it comes within any of the express provisions of the constitution or not. It is ⁶⁷⁹ not a law, but an act which attempts to take the property of one citizen, and turn it over to another; to compel one class to donate a part of its property to another. Under the express terms of the constitution, private property cannot be taken for private use, even with compensation, without the owner's consent, nor can it be taken for public use without just compensation. There is no claim here, nor can any be made, that these taxes thus imposed under the act are for any public use; nor could the state itself carry on such a business.

Counsel for relator seek to uphold this legislation by several cases cited in their briefs. Attention is called to Taylor

v. Ypsilanti, 105 U. S. 60, in which it was said: "In 1859 the legislature of Michigan passed an act providing for the payment from the state treasury of a certain sum, by way of bounty, for every bushel of salt manufactured by any individual, company, or corporation, from water obtained by boring in Michigan, and exempting from taxation property used for such purposes: Mich. Laws 1859, p. 551. That law was subsequently amended, and in *People v. Board of State Auditors* (decided in 1861), 9 Mich. 327, it was held that the relator, a manufacturing company, acquired a vested right to the amount offered by the original act for all salt manufactured prior to the amendatory statute reducing the bounty. And the doctrines of that case were reaffirmed in *East Saginaw Mfg. Co. v. East Saginaw* (decided in 1869), 19 Mich. 259, 2 Am. Rep. 82, after the passage of the act of March 22, 1869. The diligence of counsel, aided by our own researches, has not disclosed any adjudication of the supreme court of Michigan prior to May 26, 1870, in which the doctrine of these cases was recalled."

From an examination of the cases referred to in the above opinion in this court, it is evident that the constitutionality of the salt bounty act was not raised or passed upon. In the first case a mandamus was asked to compel the board of state auditors to allow a claim under the original act, as the board had refused payment on the ground that a subsequent act repealed the former one. ⁴⁸⁰ In the second case a bill had been filed to restrain the collection of the taxes levied upon the property of complainant (the salt manufacturing company) invested in the business of manufacturing salt. The ground for filing the bill was that the statute in force when the complainant commenced its manufacture exempted from taxation the property employed for that purpose; and complainant insisted that this statute was a contract between itself and the state, and was irrepealable. The court held, however, that the statute was nothing but a bounty law, and as such might be repealed at any time. On error this was affirmed by the supreme court of the United States: *East Saginaw Salt Mfg. Co. v. East Saginaw*, 13 Wall. 373.

We think the present case comes squarely within the reasoning of this court in *People v. Township Board of Salem*, 20 Mich. 452, 4 Am. Rep. 400. In that case the question was the constitutionality of an act permitting certain townships to issue bonds in aid of the construction of a railroad. It was said by

Mr. Justice Cooley, beginning at page 486: "But it is not in the power of the state, in my opinion, under the name of a bounty, or under any other cover or subterfuge, to furnish the capital to set private parties up in any kind of business, or to subsidize their business after they have entered upon it. A bounty law of which this is the real nature is void, whatever may be the pretense on which it may be enacted. The right to hold out pecuniary inducements to the faithful performance of public duty in dangerous or responsible positions stands upon a different footing altogether. Nor have I any occasion to question the right to pay rewards for the destruction of wild beasts and other public pests, a provision of this character being a mere police regulation. But the discrimination by the state between different classes of occupations, and the favoring of one at the expense of the rest, whether that one be farming or banking, merchandising or milling, printing or railroading, is not legitimate legislation, and is an invasion of that equality of right and privilege which is a maxim in state government. When the door is once opened to it, there is no line at which we can stop, ⁶⁸¹ and say with confidence that thus far we may go with safety and propriety, but no farther. Every honest employment is honorable; it is beneficial to the public; it deserves encouragement. The more successful we can make it, the more does it generally subserve the public good. But it is not the business of the state to make discriminations in favor of one class against another, or in favor of one employment against another. The state can have no favorites. Its business is to protect the industry of all, and to give all the benefit of equal laws. It cannot compel an unwilling minority to submit to taxation in order that it may keep upon its feet any business that cannot stand alone. Moreover, it is not a weak interest only that can give plausible reasons for public aid. When the state once enters upon the business of subsidies, we shall not fail to discover that the strong and powerful interests are those most likely to control legislation, and that the weaker will be taxed to enhance the profits of the stronger. I shall not question the right of the people, by their constitution, to open the door to such discriminations; but in this state they have not adopted that policy, and they have not authorized any department of the government to adopt it for them."

On page 495 of the case it was said by Justice Campbell: "It has been said to be too clear to need argument that it would

be usurpation, and not legislation, to take the property of A and give it to B. It must be on the same ground equally illegal to tax A for the benefit of B; for the amount of property taken against his will cannot make any difference in the principle; neither can it make the wrong any less that he has companions in misery. Taxation for private purposes is no more legal than robbery for private purposes. And where an enterprise is conducted by private persons for their own private benefit, the public authorities having no control over the expenditure, and no share in the profits, it is a private enterprise, and not a public one, whether large or small, and whether profitable or unprofitable. No enterprise can be properly regarded as a public enterprise in which the public has no voice. For the expenditure of public money the constitution and laws provide public officers, and put them under adequate control and security. The money of the people belongs in the custody of the agents of the people. Governments ⁶⁸² cannot delegate public responsibilities to private and irresponsible hands."

These views have been affirmed and reaffirmed by this court: *People v. State Treasurer*, 23 Mich. 499; *Anderson v. Hill*, 54 Mich. 477, 20 N. W. 549; *Davis v. Board of Supervisors*, 64 Mich. 404, 31 N. W. 405; *Dodge v. Van Buren Circuit Judge*, 118 Mich. 189, 76 N. W. 315; *Attorney General v. Pingree*, 120 Mich. 550, 79 N. W. 814.

The first contention of counsel for relator has no more substantial foundation than the other. The act of 1897 is unconstitutional and void; and yet counsel contend that, though this be found, under the act of 1899 it is entitled to the bounty there appropriated. Counsel cite, in support of this proposition, the case of *United States v. Realty Co.*, 163 U. S. 427, 16 Sup. Ct. Rep. 1120. The question there raised was entirely different from the question here. Here no specific appropriations were made by the act of 1899 by which the sugar bounties could be paid, and the legislature has not recognized the relator's claim. But it has been held several times in this state that an unconstitutional statute is a statute only in form, and lacks the force of law, and is of no more saving effect to justify action under it than as though it had never been enacted: *Mason v. Perkins*, 73 Mich. 303, 41 N. W. 426; *Adsit v. Osmun*, 84 Mich. 420, 48 N. W. 31.

The writ of mandamus must be denied.

The other justices concurred.

BOUNTIES.—For a discussion of the nature and meaning of bounties, see *Ingram v. Colgan*, 106 Cal. 113, 46 Am. St. Rep. 221, 38 Pac. 315, 39 Pac. 437. For an appropriation of public money for the payment of sugar bounties, see *State v. Moore*, 50 Neb. 88, 61 Am. St. Rep. 538, 69 N. W. 373, and for a discussion of the constitutional authority of legislatures to lend aid to private or quasi public enterprises, see *People v. Salem*, 20 Mich. 452, 4 Am. Rep. 400.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

BOLLAND v. O'NEAL.

[81 Minn. 15, 83 N. W. 471.]

TIMBER—GRANT OR LICENSE.—A grant of a right to enter upon land at any time within a specified period, and cut and remove therefrom all of the standing pine, is a conveyance of an interest in the land, and not a mere license revocable at will.

TIMBER, SALE OF—NOTICE TO SUBSEQUENT PURCHASER.—Persons who enter into the possession of land under a grant of the right to remove the timber therefrom, construct logging camps, and engage in cutting such timber, are in such open and adverse possession as to constitute notice of their right to subsequent purchasers of the land. The facts that such logging camps are more extensive than required to remove that particular timber, and that such persons are engaged in general logging operations in the vicinity are immaterial.

J. N. Searles, for the appellant.

Calhoun & Bennett and C. W. Kent, for the respondent.

¹⁵ LEWIS, J. This action was brought to recover damages from defendants for the cutting and carrying away of pine timber from land claimed to be owned by plaintiff. In 1894 the then owner of the land, Wray, executed in the usual form, under seal, a certain instrument by which he sold the standing pine on the land to defendants Mulvey & Carmichael. The consideration expressed was twelve hundred dollars, and the granting clause was as follows: ¹⁶ "Do by these presents grant, bargain, and sell unto the said parties of the second part, their heirs and assigns, the right, privilege, and permission to enter upon the following described tracts of land [description] at any and all times prior to the sixth day of June, A. D. 1899,

on which last-mentioned date this permit shall cease and terminate, and cut and remove from said lands, during said time, all the pine timber standing or being thereon."

Then follows a covenant of seisin as to the land, a covenant of warranty of title to the timber, and an agreement on part of the grantor to pay the taxes upon the premises during the life of the grant. This deed was never recorded. On October 10, 1898, Mulvey & Carmichael entered into a contract with the other defendants, O'Neal Brothers, by the terms of which the latter firm were to cut and remove all of the pine upon the premises suitable for logging. In pursuance of this agreement O'Neal Brothers entered upon the land and removed the pine during the winter of 1898-1899; and while in possession the owner of the land, Wray, conveyed it, without reservation of the pine, to the plaintiff. At the trial below, plaintiff had a verdict for two thousand seven hundred and seventy-three dollars and sixty cents, and defendants appeal from an order denying a new trial.

The deed from Wray to plaintiff was dated January 19th, and was recorded in the proper county January 26, 1899. In October, 1898, O'Neal Brothers entered upon the land, and established a logging camp, building two barns, a cook-house, sleeping quarters, office, storehouse, and blacksmith-shop. The land consisted of one hundred and twenty acres, and a road ran through the center forty, east and west. One forty adjoined this center one on the south, and the other on the north. All of the buildings, except the office, were located on the central forty; and the blacksmith-shop and storehouse were on the north side of and close to the road, and the cook-house was on the south side of and close to the road. The other buildings were scattered over a considerable tract of land, the office being located on the northwest corner of the south forty, and near a branch road or trail. This camp was established for the accommodation of about one hundred men and many horses, and O'Neal Brothers occupied it with a large force of men and teams, and were conducting logging operations upon lands in that vicinity during the months of November and December, 1898, January and February, 1899. There was a conflict of testimony as ¹⁷ to the time the timber was cut upon the land in question. It was maintained by defendants that they had cut all on the north forty by January 19th, and the entire amount by February 7th, while plaintiff claimed that most of it was cut after February 7th. This latter date was the day

upon which plaintiff served notice upon defendants of his ownership of the land and timber. The cause was tried and submitted by the court below upon the theory that the deed from Wray to defendants, Mulvey & Carmichael, was only a license to go upon the land, and was revoked by the deed from Wray to plaintiff; hence defendants were liable for the timber they cut after receiving actual notice of the revocation by that deed. The jury was instructed to return a verdict for the plaintiff for the value of the timber cut by defendants after the receipt of that notice.

Defendants rested upon the theory that such deed was a conveyance of an interest in the land, and could not be revoked by the mere fact of a subsequent conveyance of the land, and contended that, although their deed was not recorded, they were in such possession of the premises as put plaintiff upon notice of their rights when the land was conveyed to him, January 19, 1899. For the purpose of raising that question, defendants requested the court to submit to the jury the following instruction: "If the jury find from the evidence that, at the time plaintiff took his deed from Wray, the defendants O'Neal Brothers were occupying the land in question with their camp buildings, camp outfit, and crew, and actually cutting and removing the timber therefrom, under a permit previously granted defendants Mulvey & Carmichael, by Wray, plaintiff's grantor, then they will find a verdict for the defendants." The request was refused, and the assignment directed to this point is the only question in the case requiring notice.

The deed from Wray to Mulvey & Carmichael was not a mere license, revocable at the will of the grantor. It was in effect a conveyance of the pine, with the privilege to go upon the premises within a stipulated time and remove it. As between the grantor and grantees, the latter had the absolute right to enter upon the land at any time before June 6, 1899, and to cut and remove the timber. ¹⁸ Such a deed is a conveyance of an interest in real estate: *Pine Co. v. Tozer*, 56 Minn. 288, 57 N. W. 796.

Was the possession of defendants of such a nature, as a matter of law, as to put plaintiff upon inquiry? The nature of the possession in such cases would tend to be in accordance with the nature of the land, and the uses to which it was adapted. If it were farming land, the indicia of possession would more naturally be in the way of preparing it for tilling purposes. If it were grazing land, the preparation for permanent possession

would likely be different. Here we have timber land, and the chief value is in timber. The defendants owned that timber, and had the right to possession of the land in order to remove it. As between themselves and the owner of the land, they were required to take possession only in such a manner as would serve their purpose in removing the timber. They might go in at night or stealthily remove it, as timber thieves or trespassers, and their grantor could not complain; but, as to subsequent purchasers, such temporary possession would not be sufficient to attract notice. But O'Neal Brothers did not do it that way. They took actual and open possession of about twenty acres of the central portion of the land, along the roads, and scattered buildings all over it. No one could go along that way without being challenged at once by open, notorious, adverse acts of possession. They had commenced to cut the trees down, and were in the act of cutting timber upon the land, when plaintiff purchased.

It is claimed that they overdid it by taking possession on too large a scale—as though a passer-by would say: "These people are not in possession of this land with any intent to remain or to take off this timber. They are engaged in the general logging business, and are after the timber on some other land." The law of notice by possession is based upon the character of the acts, as tending to show a purpose of maintaining an interest inconsistent with the owner's title. And such acts must be such as will attract the attention of anyone going upon the land. Therefore, the more open, notorious, and visible such acts are, if consistent with the purpose in view, the more probability of such possession being known. The fact that defendants had built large camps, and stationed thereon a larger crew of men and force of teams than was necessary to log the one hundred and twenty ¹⁹ acres in question, was not inconsistent with their purpose to cut the logs from that land. The ordinary man passing by while such operations were going on would have no possible ground to assume that the possession was without reference to the timber on the premises, and the ordinary person contemplating the purchase of the land under such circumstances would want to know the meaning of those operations.

The order denying defendants' motion for a new trial must be reversed for error in refusing to give the instruction as stated.

Order reversed and a new trial granted.

STANDING TIMBER is an interest in lands that may be acquired by deed, and the fact that the deed provides that such timber must be removed within a definite period does not prevent the title thereto from vesting in the grantee: *Mee v. Benedict*, 98 Mich. 260, 39 Am. St. Rep. 543, 57 N. W. 175. On the effect of a license to remove timber, see *Macomber v. Detroit etc. R. R. Co.*, 108 Mich. 491, 62 Am. St. Rep. 713, 66 N. W. 376.

STATE v. UNITED STATES EXPRESS COMPANY.

[81 Minn. 87, 83 N. W. 465.]

CORPORATIONS—DUTY TO FURNISH INFORMATION AS TO THEIR BUSINESS.—If the state has a legal right, through its officers, to call upon corporations or companies for information as to their business, they cannot be permitted to determine for themselves whether they will answer or not, for the reason that it is not possible for them to do so. It is their duty in such cases to answer candidly, so far as reasonably possible, and to state the facts which they claim excuse them for not answering more fully.

EXPRESS COMPANIES—VISITORIAL POWER OF STATE—INFORMATION AS TO BUSINESS.—Express companies are not corporations subject to the visitorial power of the state, but partnerships engaged in the business of common carriers, and as such may be compelled by the state to furnish information as to all of their property and business within the state, but they cannot be compelled to furnish information as to their interstate business and their property and business outside the state.

EXPRESS COMPANIES—CONTROL AND VISITORIAL POWER OF STATE.—An express company is not a corporation, but a partnership, and has the same right to do business in the state without its permission and free from its control and visitorial power as any other individual or partnership, except in so far as its business within the state is affected with a public interest, and therefore subject to public control and regulation.

EXPRESS COMPANIES are not subject to the provisions of the interstate commerce acts.

W. B. Douglass, attorney general, and Childs, Edgerton & Wickwire, for the appellant.

Davis, Kellogg & Severance, for the respondent.

88 START, C. J. The railroad and warehouse commission of this state, pursuant to Laws of 1895, chapter 152, submitted to the defendant certain questions in relation to its business and property, and required it to answer them. The defendant answered the questions and returned full information so far as they related to its business and property within the state, but as to its business and property outside of the state and

as to its interstate business it made no answer. Thereupon the relator commenced this action to compel the defendant, by mandamus, to make answer to omitted questions. The defendant answered that it was impossible for it to furnish the omitted information, and that the relator had no power or right to demand of it such information.

The trial court found that the defendant is not a corporation, nor does it enjoy any franchises, rights, or privileges not by law accorded to natural persons, but that it is a partnership engaged as a common carrier doing an express business in this state; that while it was not possible for the defendant to answer the omitted questions with positive accuracy, it was and is possible for it to make answers thereto with approximate accuracy, but to do so would impose upon it labor and expense so great and burdensome as to render the request of the relator unjust and unreasonable; that such information, were it practicable to furnish it, would serve no legitimate purpose, and would have no bearing upon any question which could be officially or lawfully entertained by the relator; and that it was not legally entitled to require it. As a conclusion of law, the court held that the relator was not entitled to any relief, and discharged the alternative writ. The relator appealed from an order denying its motion for a new trial. The relator, by appropriate assignments of error, challenges the correctness of the findings and conclusions of the trial court.

89 1. Were there no other questions involved on this appeal, except as to the ability of the defendant to furnish the omitted information and the reasonableness of the relator's demand, we should hesitate before affirming the order appealed from. It is true that the evidence tends to show that to furnish all of the desired information would involve the examination of some twenty-five millions of way-bills, which would occupy the attention of thirty experts for at least a year, and then the information would be only approximately correct. But in cases where the state has the legal right, through its officers, to call upon corporations or companies for information as to their business, they cannot be permitted to determine for themselves whether they will answer or not, for the reason that it is not possible for them to do so. It is their duty in such cases to answer candidly, so far as reasonably possible, and state the facts which they claim excuse them for not answering more fully. Any other rule would lead to abuses and evasions not to be tolerated. But conceding for the purposes of this appeal, without so de-

ciding, that it was reasonably possible for the defendant to have answered more fully, it does not follow that the court erred in not requiring it to do so. This would depend upon the right of the relator to require of the defendant the omitted information.

2. The case then turns upon the legal right of the relator to require the defendant to furnish information as to its interstate business and its property and business outside of the state. If it were a corporation, domestic or foreign (see Gen. Stats. 1894, sec. 3425), the state, by its authorized officers, would have the undoubted right to require full information as to all of its business; for the state has the right to know what its creature, or one of another sovereignty that it permits to come into the state, is doing. If, however, it be not a corporation endowed by law with special franchises and rights, but a partnership existing by virtue of the contract of its members, then the state possesses none of the visitatorial powers which it may exercise over corporations. If such be this case, then the state has the same control over the defendant, and the same right to exact information from it that it would have over and from the individual proprietor engaged in the business of a common carrier, and not otherwise.

⁹⁰ The legal status of the defendant is, then, an important question. It is admittedly a joint stock company organized in the state of New York by an agreement between its members, and exists independently of any public grant or franchise. We hold with the trial court that the defendant is not a corporation, but that it is in fact and law a partnership, having many of the characteristics of both a corporation and the essential features of a common-law partnership. It is not, however, a legal entity, and has no existence apart from its members. This is now settled by the decision of the highest court of its origin, and we need not further discuss the question: *People v. Coleman*, 133 N. Y. 279, 31 N. E. 96; *Whitman v. Hubbell*, 24 Blatchf. 240, 30 Fed. 81; *Hoey v. Coleman*, 46 Fed. 221; *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. Rep. 426.

3. The defendant not being a corporation, but a partnership, has the same right to do business in this state without its permission, and free from its control and visitatorial power, as any other individual or partnership. But it is a common carrier, and as such its business is affected with a public interest, and therefore subject to public control and regulation, including its charges for its services as such carrier, as to all of its

state or domestic business. Therefore, the relator had the legal right to demand information as to such business, and all of its property employed therein as a basis for such public regulation of its business, and the fixing of reasonable rates for its services. The defendant answered all questions as to such business and property to the satisfaction of the relator. The relator, however, had no legal right to demand of the defendant information as to its business and property outside of the state, or as to its interstate business, except so far as the same was necessary to enable the relator to discharge its duties as to the defendant's business and property within the state: Gen. Stats. 1894, sec. 388.

If the relator was charged with any duty as to the taxation of the defendant, it might be necessary for it to obtain the information sought in this case: See *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 17 Sup. Ct. Rep. 305. But it is not. This duty is placed upon the state auditor: See *Laws 1897, c. 309*. Nor could it utilize the information for the basis of a complaint to the interstate commerce commission, for express companies organized for the transaction of ⁹¹ the express business on their own account are not subject to the provisions of the interstate commerce acts (*United States v. Morsman*, 42 Fed. 448); nor use it in determining reasonable rates for defendant's services as to its domestic business as a carrier, for such rates must be established "with reference solely to the amount of business done by the carrier wholly within such state, . . . and to the fair value of the property used in conducting it, without taking into consideration the amount and cost of its interstate business, and the value of the property employed in it": *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. Rep. 418; *Northern Pac. Ry. Co. v. Keyes*, 91 Fed. 47. We do not, however, understand that, in cases where the same property or plant within the state is employed by the carrier in conducting both its domestic and interstate business, it is not proper, in fixing a rate for the former, to ascertain the total volume or tonnage of each, as a basis for apportioning the cost of reproducing the plant between the two. But no such question is presented by the record in this case.

No other reasons than those we have considered are suggested, and none occur to us, why it was necessary or permissible for the relator to demand the information in question, and our conclusion upon the whole record is that it was not legally entitled to insist on it being given, because it was not reasonably neces-

sary to enable the relator to discharge its duties, and could serve no useful purpose.

Order affirmed.

EXPRESS COMPANIES.—On the nature, rights, and liabilities of express companies, see the monographic notes to *Bullard v. American Express Co.*, 61 Am. St. Rep. 360-385; *Pittsburgh etc. Ry. Co. v. Mahoney*, 62 Am. St. Rep. 513-525.

CORPORATIONS.—VISITORIAL POWERS over corporations are discussed in *State v. Georgia Medical Society*, 38 Ga. 308, 95 Am. Dec. 408; *Sanderson v. White*, 18 Pick. 328, 29 Am. Dec. 591; *Regents v. Williams*, 9 Gill & J. 365, 31 Am. Dec. 72.

BALDWIN v. GREAT NORTHERN RAILWAY COMPANY.

[81 Minn. 247, 83 N. W. 986.]

GARNISHMENT OF CARRIERS—DAMAGES FOR UNREASONABLE DELAY.—Property in the hands of a common carrier received for transit to a place outside the state is not subject to garnishment. The carrier must respond in damages for any loss or diminution in the value of the property caused by unreasonable delay in its transportation, by reason of the service of a garnishment in a suit between the consignor and a third person. If, in such case, the carrier has placed the property in a car on a sidetrack for transportation, and has issued a bill of lading to the shipper, the fact that the car has not been placed in a train at the time of the service of the garnishment does not excuse the carrier for unreasonable delay in forwarding the property to its destination.

Squires & Begg, for the appellant.

O. J. Cook, for the respondents.

248 LOVELY, J. This is an appeal from a judgment of the municipal court of St. Paul in favor of plaintiffs, who complain of the unlawful detention by defendant of a carload of potatoes while being transported over its line from Anoka, in this state, to Chicago, Illinois. This review is limited to the question whether the findings of fact support the conclusions of law upon which the judgment rests.

The facts found by the court are, in brief, as follows: The plaintiffs were partners in the produce business. They delivered to defendant, at its station in Anoka, a quantity of potatoes for transportation to Chicago, which were loaded in one of defendant's cars, and placed on a sidetrack for shipment.

The loading had been completed, the defendant had accepted the potatoes for transportation, and had issued to plaintiffs its bill of lading, in which the place where the same was received and the place of destination were designated, the plaintiff's firm was named as the consignor as well as the consignee of the property. While the car of potatoes was still awaiting shipment on a regular train of defendant's road, but before it had been placed therein for that purpose, a garnishee summons, properly issued, was duly served upon defendant in a suit against plaintiffs by a third party, upon the claim, regularly made, that the property of plaintiffs, above referred to, should be arrested, and held by defendant for the benefit of the plaintiff in that suit.

The carload of potatoes was hauled by defendant to St. Paul, and ²⁴⁹ within a reasonable time notice was sent to plaintiffs, at Anoka, of the service of the garnishee summons upon the company. After the arrival of the potatoes at St. Paul they were detained and held by defendant in observance of the garnishee summons; plaintiffs were again notified (this time at Chicago) of the fact and reason of such detention; whereupon one of the plaintiffs came to St. Paul from Chicago, and, upon negotiations with defendant (while reserving the right to claim damages, if any, for delays), secured the shipment of the car to its destination, where the potatoes were sold at a loss of forty-five dollars and eighty-two cents, occasioned by the detention of the same for five days at St. Paul, which detention was unreasonable and unnecessary, unless the defendant was required to retain and hold the same by the garnishee proceedings.

The trial court held that the potatoes were perishable, were in actual transit, were injured by the unnecessary delay, and that the garnishee service furnished no excuse for their detention; also that the expenses of the trip by one of the plaintiffs to St. Paul to secure their shipment was a proper item of claim by plaintiffs; and ordered judgment for the loss on the potatoes as well as the expenses of such trip.

We think there is no doubt that the findings of fact show that the delay occasioned the damages to the extent found, and, if it is not excused by the garnishment, the conclusions of the court, and judgment thereon, to that extent must be sustained. This view involves the question whether, under the law as previously laid down by this court, the garnishment required the defendant to retain the car of potatoes subject thereto. It was

the unquestionable duty of the common carrier to fulfill its contract of carriage unless it was prevented by legal process from doing so, and this is the question which we are required to determine in this case. In *Stevenot v. Eastern Ry. Co.*, 61 Minn. 104, 63 N. W. 256, it was held that "property in the hands of a common carrier in transit to a place outside of the state is not subject to garnishment, although it is yet within the state at the time of the service of the garnishee summons." This rule was held in a case where the property was in a train already made up, standing on a siding at the place of shipment. The defendant in that case disregarded the garnishee summons, ²⁵⁰ and transported the property to its destination, where it was then delivered to the consignee.

It is urged by the defendant that, the court having found the fact that defendant's line terminated at St. Paul, its duty to the plaintiffs as a common carrier ended there, and that it owed no further obligation to the plaintiffs than to transport their property to that point (within the state), which fact would distinguish this from the *Stevenot* case. The answer to this contention seems to us very clear. Defendant had contracted as a common carrier to transport the potatoes to Chicago, and was bound by that contract, whether it hauled its car over its own road or other lines.

It only remains to be considered whether defendant, after having received the carload of potatoes on its sidetrack, and given its bill of lading to the shippers, was then required to forego its rights, and hold the property because it had been garnished, instead of transporting it to the place where it was stipulated between the parties it should be delivered, which was its plain right, under the terms of the garnishee statute: Gen. Stats. 1894, sec. 5325. We are unable to distinguish this case from the *Stevenot* case in that respect. It is true that the car in that case had been placed in a train for shipment; in this case, it was on the sidetrack, to be placed in the train as soon as it arrived. But the contract between the parties for transportation had been completed, the bill of lading had been delivered to the consignors, and it was the privilege of the carrier, under the statute last cited, to retain the consigned property, and fulfill its contract with the shippers, which alone entitled it to compensation for carriage. For this reason the plaintiffs' creditor in the garnishee suit could not arrest it by that process so as to deprive the defendant of its right under such contract.

Upon the facts found with reference to the trip of one of the plaintiffs from Chicago to St. Paul, we are unable to sustain the conclusion of law reached by the trial court. While under proper circumstances, and upon proper proofs, it might be held that it was necessary for one of the plaintiffs to come from Chicago to St. Paul to secure the release of the car, to diminish the damages in favor of defendant which would otherwise be suffered, yet the plaintiffs could not claim reimbursement for such expenses unless it was ²⁵¹ established that they were necessary and reasonable (1 Sutherland on Damages, sec. 88), which involves facts not found by the trial court. We hold, therefore, that the trial court was justified in its conclusion that plaintiffs were entitled to damages sustained by the diminution in the value of the potatoes occasioned by defendant's unreasonable detention of plaintiffs' property, but that the judgment was erroneous in including the amount of the expenses from Chicago to St. Paul.

It is ordered that the case be remanded, with directions for a new trial, unless plaintiffs consent to release the defendant from the payment of thirty dollars, the sum allowed for such expenses, within ten days from the time the remittitur is returned, in which case the judgment is to be modified in that respect. In view of the particular facts of this case, we direct that no statutory costs be allowed to defendant on this appeal.

Judgment modified.

GARNISHMENT OF CARRIER.—It is held in *Landa v. Holck*, 129 Mo. 663, 50 Am. St. Rep. 459, 31 S. W. 900, that property in the hands of a common carrier awaiting shipment is subject to garnishment at any time before its transit has commenced: See, further, *Van Camp etc. Co. v. Plimpton*, 174 Mass. 208, 75 Am. St. Rep. 296, 54 N. E. 538; note to *Landa v. Holck*, 50 Am. St. Rep. 465-467.

BOARD OF EDUCATION v. ROBINSON.

[81 Minn. 305, 84 N. W. 105.]

OFFICERS—OFFICIAL BONDS—EXECUTION ON CONDITION.—If a surety signs an official bond upon the express condition that it shall not be delivered until certain others shall be procured to sign and execute it, and such condition is brought to the knowledge of the obligee, delivery without a compliance with such condition is ineffectual to give validity to the bond as to such sureties. Such condition must, however, in all cases, be brought to the notice of the obligee before delivery of the bond. Otherwise the surety is not released by a breach of the condition.

CORPORATIONS—WHEN BOUND BY ACTS OF OFFICERS.—A public corporation is bound by the acts and conduct of its officers only when they are engaged in the duties of their office. Notice to them, to bind the corporation, must come to them in their official capacity, and while acting within the scope of their authority. An officer of a corporation not acting in his official capacity in procuring sureties for an official bond does not bind the corporation by information obtained by him while engaged in such business.

BANKS AND BANKING—CHECK ON INSOLVENT BANK AS PAYMENT.—If a county treasurer having funds belonging to a school district delivers a check therefor to the treasurer of the school district upon a bank which is at the time a "going concern," though actually insolvent, and the treasurer accepts the check, deposits it in the bank to his own credit, and receives credit therefor on the books of the bank, the transaction is equivalent to the delivery and receipt of the money by and from the county treasurer.

OFFICERS—OFFICIAL BONDS—LIABILITY OF SURETIES—SUCCESSIVE TERMS OF OFFICE.—If a person holds a public office for two or more successive terms, and executes a new bond with new sureties for each term, and a defalcation occurs on the part of the officer, the sureties on the bond given for the term during which the defalcation occurs are alone liable. If, however, such officer fails to account for and pay over to his successor the funds chargeable to him as shown by his books and final account, the sureties on the last bond are prima facie liable therefor, and, to relieve themselves, must show that the defalcation in fact occurred during a prior term.

B. F. Fowler and Childs, Edgerton & Wickwire, for the appellants.

H. S. Bassett and Gray & Thompson, for the respondent.

307 BROWN, J. On August 7, 1897, defendant Robinson was elected treasurer of plaintiff school district for the term of one year. He duly qualified as such, and discharged the duties of his office during his term. On August 6, 1898, he was re-elected to such office as his own successor, **308** and executed and delivered to plaintiff the bond on which this action is founded.

The other defendants executed the same with him as sureties. In August, 1899, H. R. Wells was duly elected as Robinson's successor, duly qualified as such, and demanded of him the money, books, and papers belonging to the office. Robinson failed to pay over to Wells the sum of thirteen hundred and sixty-seven dollars and sixty-eight cents belonging to the school fund, and this action was brought against him and his sureties to recover it. Plaintiff had judgment in the court below, and defendants appeal from an order denying a new trial.

1. One of the defenses interposed by the defendant sureties is that the bond in question was signed and executed by them upon the express condition that certain other persons should be procured to sign the same before its delivery to plaintiff; that such other persons were not procured; that the bond was wrongfully delivered, and in consequence never took effect as their obligation.

It is undoubtedly the law that if a surety sign a bond or obligation of the nature of the one here under consideration, upon the express condition that the same shall not be delivered until certain others shall be procured to sign and execute it also, and such condition be brought to the knowledge of the obligee before delivery, the delivery, without a compliance with such condition, is ineffectual to give validity to the bond as to such sureties. But such condition must in all cases be brought to the knowledge of the obligee of the bond before delivery: *Clarke v. Williams*, 61 Minn. 12, 62 N. W. 1125. If the sureties intrust the bond to their principal, and he fails to comply with the conditions, and delivers the bond in violation thereof, it becomes, upon such delivery, a valid and binding contract, if the obligee have no notice of the condition. In this case defendant sureties offered evidence tending to show the conditional execution of the bond in question, and it was excluded by the court. The court required defendants to first prove that plaintiff had notice of such condition. This ruling went to the order of proof, and was not erroneous.

Defendants attempted to show that plaintiff had notice of the condition, but wholly failed. The most that their evidence tended to show in that direction was that one or more of the officers of the plaintiff knew of the condition. But such notice did not come to ³⁰⁹ the officers in their official capacity, or while engaged in the performance of their duties to plaintiff, and plaintiff cannot be bound thereby. Plain-

tiff is a public corporation, and is bound by the acts and conduct of its officers only when they are engaged in the duties of their office, and notice to them to bind the corporation must come to them in their official capacity, and while acting within the scope of their authority: *Stoner v. Keith Co.*, 48 Neb. 279, 67 N. W. 311; *Independent School Dist. v. Hubbard*, 110 Iowa, 58, 80 Am. St. Rep. 271, 81 N. W. 241; *Carroll Co. v. Ruggles*, 69 Iowa, 269, 58 Am. Rep. 223, 28 N. W. 590; *Harvey v. State*, 94 Ind. 159; *Harrington v. Sixth School Dist.*, 30 Vt. 155; *Angell & Ames on Corporations*, secs. 309, 339, 659. Todd was not acting in his capacity as officer of plaintiff while engaged in procuring sureties for Robinson's bond, and plaintiff is not bound by information obtained by him in doing so: *Bang v. Brett*, 62 Minn. 4, 63 N. W. 1067; *Schussler v. Board of Commrs.*, 67 Minn. 412, 64 Am. St. Rep. 424, 70 N. W. 6.

2. Defendants also claim that Robinson never in fact received the money in question or its equivalent, and never became liable therefor.

The facts are that the particular money came from the county treasurer. That official delivered to Robinson, as school treasurer, on July 21, 1898, a check for the sum of two thousand eight hundred and ninety-one dollars and one cent on the Fillmore County Bank, which amount represented public moneys due from the county to the school district. Robinson accepted the check, presented the same to said bank for payment, and received credit as treasurer of plaintiff on the books of the bank for the full amount. He subsequently checked out of said bank all of said money save and except the amount of the shortage sought to be recovered in this action. It clearly appears that, at the time the check was so delivered to defendant Robinson by the county treasurer, the Fillmore County Bank, upon which it was drawn, was insolvent, and unable to pay its debts.

Appellants contend that the acceptance by Robinson of the county treasurer's check, and the transfer of the amount thereof to his credit on the books of the bank, did not amount to a receipt of the money by Robinson to any greater extent than the amount thereafter actually drawn out by him. And, further, that because of the fact that the bank was insolvent at the time, the county ³¹⁰ had lost its money therein, and none passed to Robinson by the check. This contention is not sound

and cannot be sustained. There is no evidence that the bank did not have funds on hand to meet the check the day it was delivered. It may have been insolvent—hopelessly so—and still have had ample funds on hand to meet this particular check. It appears to have been a “going concern,” and was then, and continued for some time thereafter, doing its ordinary and usual banking business. Robinson’s acceptance of the check, and obtaining credit for the amount thereof on the books of the bank, was equivalent to the delivery of the money to him. It was not necessary to actually draw the money out of the bank, and then redeposit it: *Hare v. Bailey*, 73 Minn. 409, 76 N. W. 213. There is no suggestion of fraud on the part of the county treasurer.

3. Defendants further claim that the shortage in question occurred during Robinson’s first term of office, and that these defendants, sureties upon the bond for the second term, are not liable therefor. This presents the only serious question in the case.

There is no claim that Robinson had the money in question upon his person at the time of entering upon his second term of office or when he executed the bond sued on. It was then on deposit to his credit in the bank, and he possessed it in no other way. The position of appellants is that at and before the commencement of Robinson’s second term the bank was insolvent, and unable to pay its debts, and could not, and would not, have paid Robinson the balance due him had he called for and demanded it; that at no time after the execution of this bond could the bank have paid Robinson such balance. They therefore insist that the shortage occurred during Robinson’s first term, and that they are not liable. The court below found that, at the time of the execution and delivery of the bond, Robinson had in his hands the money in question, and that it was on deposit in the bank. It further found that the bank was at that time insolvent and unable to pay its debts, but refused defendants’ request to find that the bank did not have funds sufficient to pay the amount had demand been made therefor.

It may be stated as a general rule or principle of law, that where a person holds a public office for two or more successive terms, and executes a new bond with new sureties for each term, and a defalcation ³¹¹ occurs on the part of the officer, the sureties on the bond given for the term during which the defalca-

tion occurred are alone liable: Throop on Public Officers, sec. 205 et seq.; 2 Brandt on Guaranty and Suretyship, sec. 543. But where the officer fails to account for and pay over to his successor the funds chargeable to him as shown by his books and final account, the sureties on the last bond are prima facie liable therefor, and, to relieve themselves, must show that the defalcation in fact occurred during a prior term: County of Pine v. Willard, 39 Minn. 125, 12 Am. St. Rep. 622, 39 N. W. 71; Hartford v. Franey, 47 Conn. 76; 2 Brandt on Guaranty and Suretyship, sec. 522. In such case the sureties are prima facie liable, and the burden is upon them to show when the defalcation in fact occurred. The only exceptions to this principle are based upon peculiar statutes or some special condition of the bond.

The bond in this case is in the usual form, conditioned on the part of the officer for the faithful performance of his duties, and the payment to his successor, at the expiration of his term, of all money remaining in his hands as treasurer. The contention of appellants on this branch of the case is that the bank was not only insolvent and unable to pay its debts, but that for some time prior to the execution of the bond, and until it closed its doors on August 20th, five days after the bond was executed, it had no money on hand sufficient to pay the amount due Robinson, and could not, and would not, have paid it had demand been made therefor, and they insist that the court below erred in refusing to so find as a fact. If this contention can be sustained, the order appealed from should be reversed. If, as a matter of fact, the bank had no funds, and could not have paid Robinson at the time of the execution of the bond, or between that date and the time of closing its doors, Robinson's shortage in fact occurred during his first term of office, and these defendants are not liable.

We have examined the evidence very carefully and patiently, and find no sufficient reason for disturbing the findings of the learned trial court. The evidence is not direct, certain, or by any means clear or conclusive either way. And although it would have sustained a finding in support of defendants' contention, it is not so clearly and palpably against the conclusion reached by the court below as to justify interference by this court. The court was not ³¹² bound to take the evidence of Todd as absolutely true. It was its duty to fully consider his evidence in connection with the appearance of the witness and other circumstances throwing light on the truth of his

statements, and determine, from the whole evidence, the ultimate fact as to the ability of the bank to meet this demand.

Order affirmed.

BONDS—CONDITIONAL EXECUTION.—If a surety signs a bond on condition that it is not to be delivered until others sign it, delivery of the bond without their signatures releases such surety: *Spencer v. McLean*, 20 Ind. App. 626, 67 Am. St. Rep. 271, 50 N. E. 769. But he must show that the obligee had notice: *Benton County Sav. Bank v. Boddicker*, 105 Iowa, 548, 67 Am. St. Rep. 310, 75 N. W. 632. Where a public officer procured the signatures of sureties on his bond on the assurance that he would procure certain others, which he failed to do, the signers cannot evade liability if the obligee had no notice of the condition: *Carroll County v. Ruggles*, 69 Iowa, 269, 58 Am. Rep. 223, 28 N. W. 590. See, also, *Taylor County v. King*, 73 Iowa, 153, 5 Am. St. Rep. 666, 34 N. W. 774.

OFFICIAL BONDS.—THE DEFAULTS OF A PRIOR TERM are not chargeable against the sureties on an official bond for a subsequent term. The sureties on the last bond should be treated as if their principal had not been the incumbent during the previous term, and those on the first bond as if he had not been the incumbent during any future term: See the monographic note to *Crawn v. Commonwealth*, 10 Am. St. Rep. 844, on the liability of sureties on successive bonds. Consult, also, the recent case of *Independent School Dist. v. Hubbard*, 110 Iowa, 58, 80 Am. St. Rep. 271, 81 N. W. 241.

CHECKS AS PAYMENT are discussed in the monographic note to *Meyer v. Green*, 69 Am. St. Rep. 346-351.

MURRAY v. BOARD OF COUNTY COMMISSIONERS.

[81 Minn. 359, 84 N. W. 103.]

CONSTITUTIONAL LAW—CURE OF INEBRIATES—SPECIAL LEGISLATION.—A statute providing for the treatment and cure of inebriates by counties having a population of fifty thousand or more is unconstitutional, as being special legislation as to the affairs of counties, and as not being uniform in its operation throughout the state. Classification on the basis of population for the purpose of legislation upon the subject of the cure, at the cost of the public, of indigent inebriates is unconstitutional and void.

F. W. Zollman, for the appellant.

M. Gallagher, for the respondent.

360 **START, C. J.** The question presented by the record in this case for our decision relates to the constitutionality of Laws of 1897, chapter 260, entitled "An act to provide for the

treatment of inebriates by counties and prescribing rules governing the same." The defendant urges several objections to the validity of this act, but we find it necessary to consider only one of them, which is to the effect that the act violates sections 33 and 34 of article 4 of the state constitution, in that it is special legislation as to the affairs of counties, and is not uniform in its operation throughout the state.

The act provides for the commitment to, and treatment in, a private institution for the cure of inebriates, at the expense of the county of their residence, of a limited number of indigent, habitual drunkards, on their petition, or that of some friend or kin, to the probate court. Whether an indigent inebriate shall be so treated is made by the act to depend upon his voluntary election. If he elects to avail himself of the proffered bounty, and makes or consents to the making of the proper petition, the probate court may act, otherwise not; and the county must pay for his treatment if he establishes the allegations of his petition, but no more than one inebriate a year for each ten thousand population of each county can receive such aid. The act, by its terms, is limited in its operation to counties having a population of fifty thousand or more. A similar act, which applied to the whole state, was held by this court to be invalid, because it attempted to confer powers and duties upon the probate judges beyond the jurisdiction authorized by the constitution: ³⁶¹ *Foreman v. Board of County Commrs.*, 64 Minn. 371, 67 N. W. 207.

By the act here in question an attempt was made to remove the objections to the prior act pointed out in the case cited. It may be conceded, for the purpose of this appeal only, that such objections were so obviated. But the act being limited in its operation to a part only of the state, it is manifestly special legislation, and void, unless the attempted classification is a proper one. What is a proper basis of classification for purposes of legislation has been settled by this court, so far as it is practicable to lay down general rules upon the subject. The difficulty lies in the application of the rules to particular cases. A law is general and uniform in its operation which operates equally upon all subjects within the class for which the rule is adopted, provided the classification be a proper one. The legislature, however, cannot adopt an arbitrary classification; for it must be based on some reason suggested by such a difference in the situation and circumstances of the subjects placed in different classes as to disclose the necessity or propriety of

different legislation in respect thereto. Any law based upon such classification must embrace all, and exclude none, whose condition and wants render such legislation necessary or appropriate to them as a class. Legislation limited in its relation to particular subdivisions of the state, to be valid, must rest on some characteristic or peculiarity plainly distinguishing the places included from those excluded: *Nichols v. Walter*, 37 Minn. 264, 33 N. W. 800; *State v. Cooley*, 56 Minn. 540, 58 N. W. 150; *State v. Ritt*, 76 Minn. 531, 79 N. W. 535.

Classification on the basis of population is proper for the purpose of legislation upon certain subjects, but not upon all, and the precise question here to be determined is whether there is any apparent natural reason why the treatment of indigent inebriates at the expense of the public should be limited to the counties having a population of fifty thousand or more, and all other counties excluded. Or, in other words, is there such a difference between urban and rural drunkenness, and its consequences to the drunkard, his family and the public, as to naturally suggest the necessity or propriety of a classification on the basis of population for the purpose of legislation ³⁶² upon the subject of the cure, at the cost of the public, of indigent inebriates? It would seem that this question must necessarily be answered in the negative.

It is claimed, however, by the plaintiff, and such was the view of the learned trial court, that drunkenness is a greater evil to the public, and that the proportion of drunkards was likely to be larger, and that their families were more likely to become a public charge, in the cities and populous communities than in more sparsely settled rural districts; hence the purpose of the law was to protect the public in such populous centers rather than to benefit the inebriate, and for these reasons the classification was proper. This assumed difference between drunkenness in the city and in the country is one of degree, not a distinguishing characteristic. The evils of intemperance are not bounded by county lines. Possibly drunkenness in the large cities of the state is more general and a greater evil, and its consequences to individuals and the public more far-reaching, than it is in less populous communities; but if so, it affords no justification for the classification in the act here in question, for it is obvious, from the mere reading of the act, that the legislature intended by it to make provision in the nature of a bounty for the inebriate poor in a limited number of the counties of the state, and to exclude from the bene-

fit of the act all the inebriate poor outside of such counties: *Foreman v. Board of County Commrs.*, 64 Minn. 371, 67 N. W. 207.

The act leaves it optional with the drunkard whether or not proceedings shall be instituted to secure his treatment, and only one inebriate for each ten thousand population can be treated in any one year. If the primary purpose of the law was to protect the public from the results of drunkenness by curing the inebriate, why leave it optional with him, or limit the cure to one patient to each ten thousand population? The purpose of the law being to provide a bounty to needy inebriates, to the end that they may be cured of their disease, and the public thereby incidentally benefited, there is and can be no reason, necessity, or propriety for discrimination against any of them. Hence the classification on the basis of population, for the purpose of legislating for the relief of such indigent inebriates, is purely arbitrary, and the act unconstitutional. It is ³⁶³ as clearly so as would be a law providing for the care of insane persons or the poor of a limited number of counties at the cost of such counties, and excluding the insane and poor of all the other counties of the state from the operation of the act.

While we hold the law unconstitutional for the reason stated, we are not to be understood as holding that if the primary purpose of this act had been to protect the public from the consequences of drunkenness, by curing the inebriates of the disease, there is such a difference in the wants and needs in this respect of the counties included within the act and those excluded as to justify the classification attempted in this act: for we are of the opinion there is not. Nor are we to be understood as holding that a general act, uniform in its operation throughout the state, providing for the treatment of inebriates at the expense of the public, would not be a valid law; for reclaiming the inebriate, who is incapable of self-respect or self-support, and restoring him to society prepared again to discharge the duties of citizenship, directly promotes the public welfare: *State v. Cassidy*, 22 Minn. 312, 321, 21 Am. Rep. 765. The act here in question being invalid, it follows that the complaint in this action fails to state a cause of action, and that the demurrer to the complaint should have been sustained.

Order reversed.

SPECIAL LEGISLATION is the subject of the monographic note to *State v. Ellet*, 21 Am. St. Rep. 780-789. Consult, also, *State v.*

Schlitz Brewing Co., 104 Tenn. 715, 78 Am. St. Rep. 941, 59 S. W. 1033; State v. Griffin, 69 N. H. 1, 76 Am. St. Rep. 159, 39 Atl. 269; Knopf v. People, 185 Ill. 20, 76 Am. St. Rep. 17, 57 N. E. 22.

HOME FOR INEBRIATES.—A STATUTE PROVIDING that all liquor dealers should take out a special license in addition to other licenses to found and maintain an asylum for inebriates is constitutional: State v. Cassidy, 22 Minn. 312, 21 Am. Rep. 765.

MATHEWS v. GREAT NORTHERN RAILWAY CO.

[81 Minn. 363, 84 N. W. 101.]

EVIDENCE—DECLARATION TO EXPLAIN ACT.—If it is material to show the purpose or reason for the departure of a person, or of an act done by him, his declarations of his purpose, or reason for so doing, made at or about the time he acts, if made in a natural way, and without any circumstances of suspicion, are admissible as original evidence.

RAILROADS—PERSON ON CONSTRUCTION TRAIN BY INVITATION—DEGREE OF CARE REQUIRED.—If a person is on a construction train by the implied invitation of the railway company, it owes him the duty of ordinary care in the management of the train.

H. Richardson and C. Wellington, for the appellants.

A. T. Ankeny and A. Johnson, for the respondent.

364 START, C. J. The plaintiff's intestate, Thomas P. Mathews, was killed by the derailment of a construction train upon which he was riding, which was operated and controlled by the defendants Guthrie & Co. This action was brought against them and other parties by the widow of Mr. Mathews, as administratrix of his estate, to recover damages resulting from his death, which was caused, as the complaint alleges, by the negligence of the several defendants. At the close of the evidence the trial court directed a verdict for all of the defendants except Guthrie & Co., hereafter designated as the defendants, and submitted the cause to the jury as to them. Verdict for the plaintiff for five thousand dollars, and the defendants appealed from an order denying their motion for judgment notwithstanding the verdict, or for a new trial.

The assignments of error logically fall into three general groups: 1. Did the trial court err in its rulings as to the admissibility of evidence? 2. Did it err in its instructions to the jury? 3. Is the verdict sustained by the evidence?

1. The defendants were engaged as contractors in building for the ³⁶⁵ Eastern Railway Company of Minnesota a railway line about one hundred miles long between Deer River and Fosston, in this state. They sublet the grading to various parties, the track-laying to Brennan & Son, and the bridge and culvert work to the firm of Mathews & Keith, of which the plaintiff's intestate was a member. The defendants operated a construction train to aid in the execution of the work, but the track-laying and bridge firms hired their own men, and paid them for their services. The contract between the defendants and Mathews & Keith provided that the defendants should supply all timber and iron on the cars for the bridges at the most convenient points, free of charge, but the bridge contractors were to take the timber and iron from the cars. There was no provision in the contract for the transportation of the bridge contractors or any of their employes.

On August 7, 1898, the construction of the railway had been so far completed westward and across the Mississippi river at Bemidji that the construction train could cross the bridge at that point, although the bridge was not then entirely completed. On the day named the construction train started out from its siding, six miles east of the bridge, and when it reached the bridge it left a car of bridge material thereon, and proceeded westward across the bridge. The train on its return took the empty car from which the bridge material had been removed. The plaintiff's intestate, Mr. Mathews, boarded the train on this return trip at the bridge, and the train proceeded on its way toward the siding for dinner and more material. It was necessary to back the train, and it ran upon an obstruction on the track. The car on which Mr. Mathews was riding was derailed, and he was thrown upon the track and run over by a car, and so injured thereby that he died on the next day.

Upon the trial it was an important issue whether or not Mr. Mathews was rightfully upon the train, with the consent of the defendants, at the time he was injured. As bearing upon this issue, the plaintiff was permitted, over the objection and exception of the defendants, to give in evidence the testimony of a witness (Mr. Langdon), tending to show that Mr. Mathews boarded the train for the purpose of going back for the balance of the material that was ³⁶⁶ necessary for the completion of the bridge, which was to be loaded at the siding. It is true, as claimed by the defendants, that the testimony of

the witness was based on a conversation with Mr. Mathews, and his declarations had and made at the time he boarded the train. But it does not follow from this conversation that the objection that it was hearsay and incompetent was well taken. If it was material to show for what purpose the deceased boarded the train, it was competent to prove it by his statements and declarations made at or about the time he was in the act of getting upon the train. The evidence was competent, for it falls within the rule that when it is material to show the purpose or reason for the departure of a person, or of an act done by him, his declarations of his purpose, or reason for so doing, made at or about the time he acts, if made in a natural way, and without any circumstances of suspicion, are admissible as original evidence: 1 Greenleaf on Evidence, 16th ed., sec. 162, "d," "e"; State v. Hayward, 62 Minn. 474, 65 N. W. 63; O'Connor v. Chicago etc. Ry. Co., 27 Minn. 166, 38 Am. Rep. 288, 6 N. W. 481; Mutual L. Ins. Co. v. Hillmon, 145 U. S. 285, 12 Sup. Ct. Rep. 909; Commonwealth v. Trefethen, 157 Mass. 180, 31 N. E. 961.

It is, however, urged that the fact, if it be such, that the deceased was on the train for the purpose of going down to the siding to see about getting up the bridge material, was immaterial, because there was no evidence that his purpose was communicated to the conductor of the train. Whether so expressly communicated or not, the fact would be material, in connection with the other evidence in the case, as tending to show that at the time of the accident he was on the train for a purpose connected with the work of construction, and hence rightfully there. The trial court did not err in receiving the evidence.

The witness Langdon was also permitted, over the defendants' exception, to give testimony tending to show that it was the custom of Mr. Mathews and others connected with the bridge work to ride back and forth on the construction train from point to point as the work progressed, and that no objections were ever made by anyone. The defendants urge that neither the defendants, nor any of their agents who had authority to act for them, ever knew of this ³⁶⁷ custom, and therefore the evidence was immaterial. There was no direct evidence that they did so know. But the very purpose of the evidence was to show, from the nature and magnitude of the work to be done, the manner in which the several subcontractors executed their part of the work, the relation of each part of the

work to all other parts of it, and the custom of those engaged in the work to ride on the construction train without objection, that the defendants must have known and consented to Mr. Mathews and others riding, when engaged in the work, on the train. The evidence was competent and material for this purpose, and it was properly received. The weight to be given to it was for the jury.

2. The trial court, at defendants' request, instructed the jury that, if the deceased was a bare licensee upon the train, the defendants were not bound to exercise any care toward him, except to refrain from wanton and willful negligence. The court, however, submitted to the jury the question whether the deceased was on the train with the consent and invitation, express or implied, of defendants, and in this connection instructed them, in effect, that if they found from the evidence that it was the habit of the deceased, his partner, and the men engaged in the construction of the railway line, to ride on the construction train to and from their work to their camps and boarding places, and to the different parts of their work, and this practice was known to the defendants, and they made no objections to it, and the deceased was on the train by reason of such custom, they would be justified in finding that he was rightfully there, not as a passenger, but by the invitation and consent of the defendants. The defendants excepted to the instruction on the ground that there was no evidence to go to the jury upon the question of the defendants' knowledge of the custom. We are of the opinion that there was.

The evidence we have already referred to tended to establish such knowledge on the part of the defendants. The work in which they were engaged was the building of one hundred miles of railway. To facilitate the work in all of its parts, they controlled and operated the construction train. They were interested in the work of construction, as they were the contractors, and had a common interest ³⁶⁸ with the deceased in having the bridge work done. The carrying of the subcontractors and their employés to and from their work tended directly to facilitate the work, and an invitation and consent to ride may be inferred from such common interest, and the evidence that such was the custom, and that there were no objections made by the defendants. The evidence justified the giving of the instruction excepted to.

The question whether the court erred in refusing to direct a verdict is disposed of by our answer to the next question.

3. Was the evidence sufficient to sustain the verdict? We answer the question in the affirmative. There was, as already stated, evidence tending to show that the deceased was on the train by the defendants' implied invitation and consent. If such were the case—and the jury must have so found under the instructions of the court—the defendants owed to him the duty of ordinary care in the management of the train. While the evidence is conflicting as to whether such care was exercised, we are of the opinion, upon the whole evidence, that it was a question of fact for the jury, and that the verdict on this point is fairly sustained by the evidence.

Order affirmed.

EVIDENCE.—DECLARATIONS OF A PURPOSE or intention are admissible in evidence: *Viles v. Waltham*, 157 Mass. 542, 34 Am. St. Rep. 311, 32 N. E. 901; note to *Baker v. Kelly*, 93 Am. Dec. 279. But see *Harris v. Tyson*, 24 Pa. St. 347, 64 Am. Dec. 661.

PERSONS ON TRAINS not operated for carrying passengers, by invitation, are entitled to at least ordinary care on the part of the railway company: Note to *Rosenbaum v. St. Paul etc. R. R. Co.*, 8 Am. St. Rep. 656; *Ohio etc. Ry. Co. v. Watson*, 93 Ky. 654, 40 Am. St. Rep. 211, 21 S. W. 244.

RANDALL v. MACBETH.

[81 Minn. 376, 84 N. W. 119.]

DEEDS—COVENANT AGAINST ENCUMBRANCES—DAMAGES IN FAVOR OF PURCHASER.—A covenant against encumbrances is personal as between the grantor and grantee, and if the deed contains a stated consideration and the covenantee conveys the land to one having no notice of the real consideration, such grantee may, after paying off the encumbrance, recover the damages sustained against the covenantor, who cannot set up the defense of set-off or other defense existing at the time of the execution of the covenant.

Pfau & Pfau, for the appellant.

W. A. Funk, for the respondent.

377 LEWIS, J. On August 30, 1897, defendant Macbeth conveyed by warranty deed certain premises to defendant True. The deed contained a covenant against encumbrances. The expressed consideration was one thousand dollars. On October 9, 1897, defendant True conveyed by warranty deed the same

premises to plaintiff, and the deed contained a covenant against encumbrances. There was in fact an encumbrance, consisting of a mortgage. In September, 1898, plaintiff paid off the mortgage debt to save the premises from foreclosure, and brought this action to recover the amount she had paid, suing upon the covenants. Defendant Macbeth set up as a counterclaim that the real consideration of the deed from himself to True was the sale and delivery to him by True of sixteen horses, which were warranted to be sound, but were in fact defective, and that he was damaged thereby in the sum of four hundred dollars. This contract of warranty was oral. The court found the facts as pleaded, but ordered judgment for plaintiff for the full amount claimed, disallowing the counterclaim. Defendant appeals.

In the case of *Kimball v. Bryant*, 25 Minn. 496, it was held that although a covenant of seisin was a personal covenant, and, if broken at all, the breach was complete at the date of its execution, yet a conveyance by the covenantor would be sufficient to pass the chose in action to his assignee. The decision is based upon the theory that the covenantor assumes to pass by his deed a title upon which the covenantee is invited to rely. This is an assurance that the title offered is good. The covenantee, when passing that title to another by the usual deed, passes with it, for the protection of his grantee, every assurance he has from the covenantor, which includes the right to sue for a breach of the covenant, to the extent of the injury. In *Security Bank v. Holmes*, 65 Minn. 531, 60 Am. St. Rep. 495, 68 N. W. 113, this reasoning was applied to a covenant against encumbrances in the following language: 378 "The covenant, which is one of indemnity, in effect attaches itself to the title assumed to be conveyed by the deed, and accompanies it for the protection of the covenantee or any of his assigns who may finally be injured by the encumbrance."

The plaintiff, then, has the right to maintain this action against the original covenantor, and the question now before us is this: Is such right of action absolute, and not subject to set-off or counterclaim existing in favor of the covenantor against the covenantee, arising out of the failure of consideration in the original transfer? It must be admitted that as between the parties to the original deed the real consideration of the deed may be shown, and that, if the covenantee had sought to enforce his remedy for a breach of the covenant directly against the grantor, the alleged claim for damages could have been set up

as a counterclaim. It is also clear, upon authority and principle, that as between the original parties the covenant was not a "covenant running with the land," as that term is generally understood. Between the original parties the covenant was personal. If broken at all, it was broken when made. Hence the remedy is indemnity by a personal action. The personal representatives succeeded to the right of action, and not the heirs upon the death of the covenantee.

Such right of action by a covenantee is termed a "chose in action." It may be assigned, but when assigned it at once becomes more than the ordinary chose in action. It attaches to the title, for the benefit and protection of the assignee. When a grantor conveys property by deliberately placing a stated consideration in a deed, and declares that the title is free from encumbrance, he does so with the expectation that the premises may be conveyed again, and that his deed is to be one of the links in the chain of title. He knows that subsequent grantees may succeed to the benefit of the covenant, and the plainest principles of justice require that the covenantor be estopped from questioning the validity of the consideration as expressed. Subsequent purchasers without notice of the real consideration should be protected from the uncertainty which would follow if that question were opened. Such a rule would open the door to fraud, and render the covenant of little value as an assurance of title. It is the better rule to require the covenantor to state the true consideration ³⁷⁹ in his deed—thus putting all persons who deal with the title upon notice—if he would protect himself as against subsequent grantees. For these reasons, such a transfer cannot be treated as an ordinary chose in action, without prejudice to any setoff or other defense existing at the time, or before notice of the assignment.

Judgment affirmed.

COVENANTS THAT RUN WITH THE LAND are discussed in the monographic note to *Geizler v. De Graaf*, 82 Am. St. Rep. 664-690. A covenant against encumbrances runs with the land, and an action thereon can be maintained by an assignee of the covenantee: *Security Bank v. Holmes*, 65 Minn. 531, 60 Am. St. Rep. 495, 68 N. W. 113.

WARE v. SQUYER.

[81 Minn. 388, 84 N. W. 126.]

PLEDGES — THEFT OF PROPERTY — BURDEN OF PROOF.—A pledgee of personalty as security for a loan must exercise ordinary care in protecting it from theft. The burden of proof is upon him to show such care.

J. M. Murray, for the appellant.

J. M. Rees, for the respondent.

388 LOVELY, J. Action to recover the value of a quantity of jewelry pledged by plaintiff to defendant to secure the payment of money loaned to her. Defendant refused to return the jewelry after demand and tender of amount due, and offers as an excuse for not doing so the claim that the property was stolen without his fault from the place where he had deposited the same for safekeeping. The court found for the defendant generally, and specifically that the plaintiff was the owner of the property pledged; that at the time specified defendant came into the possession of the same as pledgee, and was holding it as security for money which had been loaned to the plaintiff; that the property was kept by defendant in his office safe in the Kasota ³⁸⁹ Block, Minneapolis, from which it was "stolen by parties unknown, without any fault or negligence on the part of defendant." The court also found that defendant did not, for five months after the theft, advise or inform the plaintiff of that fact.

Without going into details, it is sufficient to say that the evidence reasonably tends to support these findings. As is often the case on review of causes here, there has been a very thorough discussion of the weight of the evidence by the counsel, who contests the sufficiency of the evidence to support the findings of fact; but, under the well-settled rule uniformly applied on appeals from issues of fact to this court, the only duty we have to perform is to inquire whether the testimony reasonably tends to support the conclusion of the trial court, who passed upon its weight and credibility. After a careful reading of the settled case, it may be readily conceded that the inferences of fact that the property was actually stolen, as well as that the defendant was without fault, are open to doubt; yet we cannot say that such conclusions are not supported by evidence,

and in this respect we are bound to accept the judgment of the tribunal who saw the witnesses and heard their testimony. It only remains to apply the law to the facts so found. The defendant was the pledgee of the jewelry intrusted to his care, and where personal property is pledged as security for a loan, and it has been stolen, the bailment being for the mutual benefit of the parties, if the theft is occasioned by any negligence, the bailee is responsible; if without negligence, he is discharged. Ordinarily, diligence is not disproved, even presumptively, by mere theft; but the proper conclusion must be drawn from weighing all the circumstances of the particular case: Story on Bailments, sec. 338; 1 Am. & Eng. Ency. of Law, 661, and cases cited.

The finding by the court of the asportation is also coupled with the finding that the same was without fault or negligence on defendant's part, and this finding amounts to more than a mere conclusion of law, but involves the essential fact that the pledgee exercised due care as bailee of the property: *Clark v. Chicago etc. Ry. Co.*, 28 Minn. 69, 9 N. W. 75. A liberal but fair construction of this finding includes the view that the jewelry was kept in a reasonably safe place, that ordinary care was used in protecting ³⁹⁰ the same from theft, and, in connection with the conclusion that it was unlawfully taken by parties unknown, necessarily implies that the loss happened without fault or negligence on the part of the defendant, and necessarily relieves him from a claim for damages for its conversion.

The fact that defendant did not notify the owner of the property until five months after the theft is very potent evidence of negligence on his part in the care of the property, and, standing unexplained, of itself naturally excites suspicion of the claim that it was stolen. Whether his explanation of the same, to the effect that he had hired detectives, and notified the police, and used endeavors to recover the stolen property overcomes the effect of this testimony, is not, as already indicated, for us to decide. It was within the province of the court below to pass upon this question, and we do not feel at liberty to disturb its finding in that regard.

The finding that the property had been stolen and removed from the bailee's possession shows a condition which may be presumed to continue until proper proof shows a change in such condition, and it was not essential that the court should

have also found that it was not reclaimed or in the possession of the defendant at the time of the demand.

Order affirmed.

Pledgee—Degree of Care Required of.

A pledge is generally defined to be a bailment of goods by a debtor to his creditor to be kept until the debt is discharged: *First Nat. Bank v. Harkness*, 42 W. Va. 156, 24 S. E. 548; *Butler v. Greene*, 49 Neb. 280, 68 N. W. 496; *Markham v. Jaudon*, 41 N. Y. 235, 241; *Corbett v. Underwood*, 83 Ill. 324, 25 Am. Rep. 392; *Mitnell v. Roberts*, 17 Fed. 776-778. In the absence of special contract, a pledgee is bound to use ordinary or reasonable diligence in the care and custody of the thing pledged. The diligence required in any particular case must necessarily depend upon the character of the thing pledged, and the circumstances attending it, as well as the means of protection possessed by the pledgee: *Willeits v. Hatch*, 132 N. Y. 41, 30 N. E. 251; *Cooper v. Simpson*, 41 Minn. 46, 16 Am. St. Rep. 667, 42 N. W. 601; *Butler v. Greene*, 49 Neb. 280, 68 N. W. 496. In general, it may be said that a pledgee is bound to exercise the degree of care which an ordinarily prudent man usually bestows upon his own property of like nature under like circumstances; and he is liable for any loss or injury resulting to the pledge from his negligence and failure to exercise such care: *Murphy v. Bartsch*, 2 Idaho, 603, 23 Pac. 82; *Union Nat. Bank v. Post*, 64 Ill. App. 404; *Merchants' etc. Bank v. Baeder Glue Co.*, 164 Pa. St. 1, 30 Atl. 290. The pledgee is, in effect, a trustee for the pledgor, to return the property, on payment of the debt secured, and if this be not paid, then to dispose of the thing pledged, and after paying the debt secured, to pay over the surplus to the debtor. While the property is in the possession of the pledgee he should treat it as trust property, and not deal with it so as to impair or destroy its value, or incur its loss: *Union Trust Co. v. Rigdon*, 93 Ill. 458; *Union Nat. Bank v. Post*, 64 Ill. App. 404; *Plucker v. Teller*, 174 Pa. St. 529, 52 Am. St. Rep. 825, 34 Atl. 208. The contract of pledge may make it the duty of the pledgee to sell within a specified time, and his failure to do so is then such breach of duty as will render him answerable to the pledgor, and while special contracts may enlarge or restrict the duty of ordinary care required of the pledgee by the common law, still in the absence of such a contract, the pledgee is bound to exercise ordinary care only, and is liable to the pledgor only for negligence: *Cooper v. Simpson*, 41 Minn. 46, 16 Am. St. Rep. 667, 42 N. W. 601. The pledgee must, however, in all cases proportion his care to the value of the thing that is intrusted to him, and to the nature of it, for upon the value of the thing and the nature of it depends the injury or loss likely to arise to the party with whom he has dealt: *Erie Bank v. Smith*, 3 Brewst. 15.

Theft.—A pledgee being bound to use only ordinary diligence in the care of the thing pledged, he is consequently liable for ordinary neglect in keeping the pledge, and in case it is stolen from him, the mere fact of the theft establishes neither responsibility nor irresponsibility on his part. It is like any other loss. If the theft is occasioned by any negligence, the pledgee is responsible therefor if he is guilty thereof, if, without negligence on his part, he is discharged from liability. Ordinary diligence is not disproved, even presumptively by theft, but the proper conclusion must be drawn by weighing all the circumstances of each particular case: *Erie Bank v. Smith*, 3 Brewst. 2-13; *Schwerin v. McKie*, 51 N. Y. 180, 10 Am. Rep. 581; *Butler v. Greene*, 49 Neb. 280, 68 N. W. 496; *Petty v. Overall*, 42 Ala. 145, 94 Am. Dec. 634; *Abbett v. Frederick*, 56 How. Pr. 68. In such cases the law requires nothing extraordinary of the pledgee, but only that he take ordinary care of the goods, and if they happen to be lost by theft without his fault, he may, notwithstanding, resort to the pledgor for his debt. Thus a bank is bound only to ordinary care in keeping United States bonds pledged with it: *Jenkins v. National Village Bank*, 58 Me. 275; *Winthrop Sav. Bank v. Jackson*, 67 Me. 570, 24 Am. Rep. 56. It is undoubtedly true that, in the case of a pledge of this character, it is not enough to say that the pawnee took the same care of the thing pledged as he did of his own goods, nor is it any answer to the demand of the pawnor or debtor to show that his own property to an equal or greater amount was lost at the same time and by the same alleged negligence. He must go further than that, and satisfy the jury that there was ordinary diligence in keeping his own property. If it appears that he was not diligent in keeping his own property, that would be no excuse for negligence in keeping the property of others intrusted to him. Yet, nevertheless, as every man is presumed to exercise ordinary care of his own property until the contrary is shown, where the bailee's own goods are lost by the same occurrence, the same theft, the same fire, or whatever it may be that destroys them, there is a presumption that he used ordinary diligence, both as to his own and the pledged goods": *Erie Bank v. Smith*, 3 Brewst. 15.

In the case of *Scott v. Crews*, 2 S. C. 522, involving the theft of bonds from a bank, it was urged that the law required the pledgee to provide himself with all the mechanical improvements of the age to protect him from the consequences of a loss of the property by theft, but the court held that if this rule were adopted, instead of being bound to ordinary care only as the law requires, he would be bound to extraordinary care, which is not required in such cases. This care and diligence of prudent men in the management of their own affairs to which the bailee is bound, is to be measured in its exercise, under the like circumstances and the same situation in which he at the time is placed. The locality, too, is to be con-

sidered, for what such men do in the matter, in the country and age in which they live, is to be accepted as the result of experience in furnishing such safeguards and securities as would be most likely, having their own interests in view, to protect their property against the dangers of fire, theft, and robbery: *Scott v. Crews*, 2 S. C. 534. In such cases the care and diligence required is such as is properly adapted to the preservation and protection of the property, and a bank which is the pledgee of bonds is liable if they are stolen in consequence of its failure to exercise such care and diligence in their custody or keeping as at the time banks of common prudence, in like situation and business, usually bestow in the custody and keeping of similar property belonging to themselves: *Third Nat. Bank v. Boyd*, 44 Md. 35, 22 Am. Rep. 35.

If a pawnbroker keeps jewelry, held in pledge, in a drawer locked underneath his counter, from which place it is stolen by burglars, he cannot be held liable therefor, in the absence of proof that he failed to exercise ordinary care in the care of such property: *Abbett v. Frederick*, 56 How. Pr. 68. "If the property pledged is taken by burglars who have broken into the pledgee's place of business, the question of his liability is one of fact, and depends upon whether he has exercised ordinary care in the keeping of the property": *Abbett v. Frederick*, 56 How. Pr. 68.

Collateral Securities.—If negotiable instruments are pledged as collateral security for a debt, the duty of the pledgee in the care and collection thereof is performed by the exercise of reasonable and ordinary care and diligence. More than this is at no time required of the pledgee. "When the pledgee has exercised ordinary care and diligence to secure the fruits of the pledge, for the benefit of the pledgor, in view of all the circumstances of the particular transaction, his duty has been fully discharged": *Easton v. German-American Bank*, 24 Fed. 523.

A pledgee of collateral security for the payment of a debt, with power to sell or collect the collateral, is bound to exercise only ordinary care and diligence, and is not bound to extraordinary diligence in such sale or collection: *Sampson v. Fox*, 109 Ala. 662, 55 Am. St. Rep. 950, 19 South. 896; *Lawrence v. McCalmont*, 2 How. 426; *Muirhead v. Kirkpatrick*, 21 Pa. St. 237; *Whitin v. Paul*, 13 R. I. 40; *Slevin v. Morrow*, 4 Ind. 425; *Reeves v. Plough*, 41 Ind. 204. One who receives a note as collateral security for an existing debt, without any special agreement, is bound to use ordinary care and diligence in collecting it, and is liable for any loss which may happen to the other party by reason of a want of such care and diligence: *Roberts v. Thompson*, 14 Ohio St. 2, 82 Am. Dec. 465; *Lee v. Baldwin*, 10 Ga. 298. When a debtor pledges notes or other securities as collateral, the latter becomes a bailee thereof, and, as such, is bound to use ordinary diligence, such as persons usually exercise in reference to their own matters, in endeavoring to collect

the collateral; and for a failure to use such diligence, or for his negligence, inexcusable default, wrongful act, or omission, he is answerable for the loss resulting to his debtor: *Montague v. Stelts*, 37 S. C. 200, 34 Am. St. Rep. 736, 15 S. E. 968; *Rumsey v. Laidley*, 34 W. Va. 721, 26 Am. St. Rep. 935, 12 S. E. 866; *Chemical Nat. Bank v. Armstrong*, 50 Fed. 799; *Noland v. Clark*, 10 B. Mon. 241; *Barrow v. Rhinelander*, 3 Johns. Ch. 614; *Sellers v. Jones*, 22 Pa. St. 423; *Bank of United States v. Peabody*, 20 Pa. St. 454; *Lamberton v. Windom*, 12 Minn. 232, 90 Am. Dec. 301; *Powell v. Henry*, 27 Ala. 612; *Colquitt v. Stultz*, 65 Ga. 305; *Wells v. Wells*, 53 Vt. 1; *McLemore v. Hawkins*, 46 Miss. 715. The holder of collateral securities as a pledgee must at least exercise such diligence in their collection that they shall not be lost through the operation of the statute of limitations: *First Nat. Bank v. O'Connell*, 84 Iowa, 377, 35 Am. St. Rep. 313, 51 N. W. 162; *Northwestern Nat. Bank v. Thompson*, 71 Fed. 113. And generally the pledgee must exercise such diligence in the collection of the securities that they shall not be lost through the insolvency of the maker: *Lamberton v. Windom*, 12 Minn. 232, 90 Am. Dec. 301. The pledgee of collateral securities may exchange them without the consent of the pledgor, unless prevented by the express terms of the pledge, but if loss results from want of proper care and diligence, he is liable to the pledgor to the extent of the injury: *Girard Fire etc. Ins. Co. v. Marr*, 46 Pa. St. 504.

FOOT v. GREAT NORTHERN RAILWAY COMPANY.

[81 Minn. 493, 84 N. W. 342.]

DEATH BY WRONGFUL ACT—SETTLEMENT OF CLAIM FOR.—Under a statute giving a right of action for a death caused by a wrongful act, exclusively for the benefit of the widow and next of kin of the deceased, the personal representative of the latter may compromise and settle the claim arising under the statute with the person liable, either before or after the action is brought, and without the consent of the next of kin or the probate court.

The statute mentioned in the opinion provides as follows: "When death is caused by the wrongful act or omission of any party or corporation, the personal representative of the deceased may maintain an action, if he might have maintained an action had he lived, for an injury caused by the same act or omission by which the death was caused. But the action shall be commenced within two years after the act or omission by which the death was caused. The damages therein cannot exceed five thousand dollars, and the amount received is to be for

the exclusive benefit of the widow and next of kin, to be distributed to them in the same proportion as the personal property of deceased persons; provided, that any demand for the support of the deceased and funeral expenses, duly allowed by the probate court, shall be first deducted and paid": Stats. 1894, sec. 5913.

F. W. Foot, for the appellant, pro se.

C. Wellington, for the respondent.

493 LEWIS, J. The complaint alleges that one Michael Fanning was so injured by defendant that he died from the effects thereof; that his widow, Ellen Fanning, was appointed administratrix of his estate, but had been removed, and plaintiff appointed in her place. The action is brought to recover five thousand dollars, for causing the death, under General Statutes of 1894, section 5913. The answer set up as a defense a compromise and settlement made between such administratrix and defendant, and a release of damages. To this answer plaintiff replied by alleging that Michael Fanning left surviving him Ellen Fanning, the widow, and five children, ranging from ten to twenty-four years of age; that the settlement and compromise set forth in the answer was made without the knowledge or consent on the part of the next of kin, and 494 without the consent or knowledge of the probate court, and that such settlement has never been ratified or affirmed by either the next of kin or the probate court; that said Ellen Fanning had no authority to make such settlement, and that she never made any account of the moneys so received to said court, but that she converted the same to her own personal use. To this reply defendant demurred, upon the ground that the same did not state any facts avoiding the affirmative matter set up in the answer as a defense. The demurrer was sustained, and plaintiff appeals.

It will be noticed that the reply does not attack the settlement pleaded in the answer upon the ground that it was procured through fraud or misrepresentation. The only issue raised by the reply is that the former administratrix, Ellen Fanning, had no authority to make the settlement. The demurrer, therefore, raises the question whether, under General Statutes of 1894, section 5913, the personal representative of the deceased person has power, without the assent of the next of kin and the probate court, to compromise a claim for damages.

The right of action given under this statute is exclusively for the benefit of the widow and next of kin, upon the theory that they have a pecuniary interest in the life of the deceased, and the object of the statute is to compensate them for such loss. If there is no widow or next of kin, no action can be maintained: *Schwarz v. Judd*, 28 Minn. 371, 10 N. W. 208; *State v. Probate Court of Dakota Co.*, 51 Minn. 241, 53 N. W. 463. A release given for a valuable consideration by the person entitled to such benefit is a bar to a subsequent action brought by the personal representative of the deceased: *Sykora v. Case etc. Co.*, 59 Minn. 130, 60 N. W. 1008. In the opinion in the *Sykora* case it is stated that the personal representative is a mere trustee for the parties interested, and that the provision of the statute which requires the action to be brought in the name of the personal representative is designed for the benefit of the defendant by making it certain that the party receiving the money is authorized to do so, and thus protect the defendant from the danger of having to pay it twice. But simply because the defendant may settle with the real party benefited, and thus cut off a subsequent action by the personal representative (*Sykora v. Case etc. Co.*, 59 Minn. 130, 60 N. W. 1008), it does ⁴⁹⁵ not follow that, if the personal representative had first commenced the action, the defendant could then avoid it by a subsequent settlement with the party in interest. Neither does it follow that no compromise or settlement could be made by the trustee, either before or after commencing the action.

If the personal representative is the trustee of the parties to be benefited, for the purpose of commencing the suit, it must follow that he is their trustee for all purposes in connection with the action. Upon him devolves the responsibility of selecting counsel, collecting evidence, and incurring the expenses of a trial. Some one must determine the advisability of accepting a verdict as final, either because adverse or inadequate. Again, for the same reason, if the nature of the evidence attainable and the circumstances of the case should lead the personal representative to the conclusion that the chances of recovery would be slight, and that a compromise would be desirable without commencing the action, he has the same authority to effect a settlement before as after actually serving the summons. The statute contemplates that the entire matter of enforcing the claim and of collecting the money shall be in the personal representative, not only for the protection of the defendant,

but also in order that there may be a responsible party to take charge of the interests of those to be benefited. The law assumes that the court will appoint a trustee who is suitable for the purpose. If experience shows that incompetent persons are often selected, and that they are liable to be imposed upon in the way of being drawn into unwarranted compromises, it is a subject which properly commands the attention of the legislature. As the statute stands, its meaning is clear, and there is no call for a consideration of the common law upon the question. The following cases may be considered as bearing on the subject: *Natchez v. Mullins*, 67 Miss. 672, 7 South. 542; *Holder v. Railroad*, 92 Tenn. 141, 36 Am. St. Rep. 77, 20 S. W. 537; *Parker v. Providence etc. Steamboat Co.*, 17 R. I. 376, 33 Am. St. Rep. 869, 22 Atl. 284, 23 Atl. 102.

Order affirmed.

COMPROMISE.—A CLAIM FOR THE WRONGFUL DEATH of a human being may be compromised by the personal representative of the deceased: *Parker v. Providence etc. Co.*, 17 R. I. 376, 33 Am. St. Rep. 869, 22 Atl. 284, 23 Atl. 102.

FISH v. CHICAGO, ST. PAUL AND KANSAS CITY RAILWAY COMPANY.

[82 Minn. 9, 84 N. W. 458.]

EVIDENCE—RETROACTIVE STATUTES.—A statute declaring that the plats and surveys made by, and in the engineering department of, any municipality in the state are *prima facie* evidence in all proceedings in all courts is valid, and applies to all actions, including those between private parties and those pending at the time of its enactment.

How & Taylor, for the appellant.

C. E. Joslin, for the respondent.

¶ **START, C. J.** This action, in its analysis, is one for the recovery of the possession of such portions, if any, of lots 5 and 6, in block 171, West St. Paul Proper, as extend south of the north line of the south half of the southwest quarter of section 5, township 28, range 22. This line is designated in the record in this case as the "quarter quarter line," and it was conceded on the trial to be the north boundary line of the plaintiff's land.

The principal issue between the parties was the location of this ¹⁰ line upon the ground. There were no stakes or monuments, or other evidence upon the ground, except a post at the southwest corner of section 5, by which the government or the street, block, or lot lines could be located. The plaintiff introduced evidence, including certain maps and records of surveys in the office of the city engineer of the city of St. Paul, which she claimed located the quarter quarter line in question so as to show that a triangular piece of land off the southerly ends of lots 5 and 6 was south of the line, and therefore belonged to her. If this claim was correct, then the evidence made a prima facie case for the plaintiff, as the defendant was admittedly in possession of such part of the lots. The city maps and surveys, if competent evidence, indicated the location of the line as claimed by the plaintiff. The trial court, at the close of the evidence, directed a verdict for the defendant. The plaintiff made a motion for a new trial, and from an order granting it the defendant appealed.

It seems to be conceded that the trial judge refused to submit the case to the jury on the ground that the city maps and surveys were not competent evidence, but upon his attention being called for the first time, upon the motion for a new trial, to Laws of 1899, chapter 284, he was of the opinion that the evidence was competent by virtue of this statute; hence it was error to take the case from the jury. The principal question presented by the record for our consideration is the proper construction of the statute, which reads as follows: "All records of surveys made by the engineering department of any municipality in this state, including field-notes of surveys, profiles, plats, plans, and other files and records of such department, shall be prima facie evidence in any proceeding in all courts in this state of the correctness of the showing and statements therein made; and the existence of such files and records in the office of such engineering department shall be considered prima facie evidence of the fact that such files and records were made by such engineering department for the use and benefit of such municipality."

The defendant claims that the statute does not provide a rule of evidence between private parties as to the location of private boundaries, but that it applies only to actions in which a municipality is a party. It is clear that the statute simply prescribes a rule of evidence, ¹¹ and is within the constitutional powers of the legislature. The clear and specific language of the statute making it applicable to all proceedings in all courts of the

state forbids the construction urged by counsel for defendant. It would be difficult to select language which would more clearly express an intention to make the statute applicable to all actions and proceedings involving disputed boundary lines than that used therein. The last clause of the statute in no manner limits the general scope of the statute, as declared in the first clause thereof. The statute establishes two rules of evidence. The first declares the plats and surveys made by the engineering department of any municipality prima facie evidence in all proceedings in all courts. But if the statute had ended with this declaration, it would have been of limited value as a remedial statute, for after the lapse of years it would be difficult to prove by whom the plats and surveys were made; hence the necessity of a second rule of evidence making the fact that the plats and surveys are a part of the records in the office of such engineering department prima facie evidence that they were made by such department.

The defendant, however, claims that, even if the statute does apply to all actions, including those wholly between private parties, it does not apply to actions which, like this one, were pending at the time the statute was enacted. It is true that statutes—especially those regulating conduct or creating rights—should not be construed as retrospective in their application, unless the contrary appears to have been intended by the legislature: *Giles v. Giles*, 22 Minn. 348. But the statute in question is a remedial one, which neither creates new rights nor takes away vested ones, for it simply declares a rule of evidence. The right to have one's controversies determined by existing rules of procedure and evidence is not a vested right: *Cooley's Constitutional Limitations*, 367; *State v. Baldwin*, 62 Minn. 518, 65 N. W. 80. It is obvious from the reading of this statute that it was intended to operate retrospectively, for it would defeat its remedial purpose to construe it as applying only to plats and surveys made in the future by the engineering department. The statute was in force on and after its passage, and at that time the plats and surveys described therein became competent prima ¹² facie evidence in all actions in all the courts of this state. In the absence of any proviso to the statute indicating an intention to exclude pending actions, it is clear that the only permissible construction of it is that it is, and was intended to be, retrospective in its operation, and that it applies to pending actions as well as to future ones.

Lastly, the defendant claims that the *prima facie* case established by the plats and surveys in question, conceding them to have been competent evidence, was conclusively rebutted by other undisputed evidence in the case. The record does not sustain this contention. Treating such plats and surveys as competent evidence in the case, the location of the "quarter quarter line" was a question of fact, and the trial court rightly granted a new trial.

Order affirmed.

A RETROACTIVE STATUTE is valid only when it is remedial: Note to Merchants' Bank v. Ballou, 81 Am. St. Rep. 722. A rule of practice prescribed by statute applies to pending cases: South West Impr. Co. v. Smith, 85 Va. 306, 17 Am. St. Rep. 59, 7 S. E. 365. The rules of evidence may be changed by a retrospective statute: See the monographic note to Goshen v. Stonington, 10 Am. Dec. 139.

SANBORN v. PEOPLE'S ICE COMPANY.

[82 Minn. 43, 84 N. W. 641.]

WATER AND WATERCOURSES—RIGHT OF COMMON USER.—The public have the ordinary rights of usage in all bodies of public water. These rights include the right of boating, fishing, and the use of the water or ice for all ordinary purposes. In these respects a riparian owner has no exclusive or peculiar privileges.

WATER AND WATERCOURSES—RIPARIAN RIGHTS.—The shore owner on a public body of water may not prevent an injury to his land by the lowering or raising of the waters beyond the natural limits of high and low water mark, by artificial means, not in the exercise of rights common to all, unless such act is expressly authorized by law. The extent of the injury depends upon the condition of the shore land and the nature of the possession.

WATER AND WATERCOURSES—RIPARIAN RIGHTS.—Employment of contiguous land for the purpose of pleasure, recreation, and health constitutes such a use of adjacent bodies of public water as to command a remedy for an interference with its natural condition.

WATER AND WATERCOURSES—RIGHT TO TAKE ICE. The taking of large quantities of ice from a body of public water for the purpose of shipment to a distant market for sale, without regard to its effect upon the right of common user, is not the exercise of a common right; and if such taking results in special injury to a riparian owner, he may enjoin it, and sue in his own name for damages.

WATER AND WATERCOURSES—RIGHT TO TAKE ICE. The taking of water or ice from a body of public water by common right may result in destroying the source of supply, and no riparian owner or common user can complain. But when the use is made

of such water for commercial purposes, not of common right, the right to so use ceases at the point where the conflict of interest with the common user commences.

WATER AND WATERCOURSES—RIGHT TO TAKE ICE. The taking of ice from a body of public water as a business, for shipment to a distant market for sale, is not an ordinary use of the water by common right, but is an artificial taking which may be enjoined by a riparian owner specially injured thereby.

WATERS AND WATERCOURSES—TAKING ICE—SUBSTANTIAL INJURY.—If a body of public water is, during twelve years, lowered two feet below its natural outlet by cutting and removing ice therefrom for commercial purposes, and from the evaporation caused thereby, such taking is of a substantial character, entitling the shore owner specially damaged thereby to an injunction restraining the continuance thereof.

J. B. & E. P. Sanborn and R. Clarke, for the appellant.

Durment & Moore, for the respondent.

48 LEWIS, J. The complaint in this action alleges, in substance, that the plaintiff now and for twelve years has been the owner of, and in possession of, certain real estate bordering on White Bear lake, in the village of White Bear, Ramsey county, Minnesota; that the shore line of said premises along the lake is one hundred and seventy-five feet; that plaintiff has made certain improvements thereon, consisting of a dwelling-house, a stable, outhouses, etc., of the value of ten thousand dollars, and that the value thereof consists mainly in the connection **49** of the premises with the waters of the lake. It is further alleged that White Bear lake is naturally a large body of pure, clear, spring water, covering an area of two thousand four hundred acres of land, contiguous to the cities of St. Paul, Minneapolis, and Stillwater, has a reputation as a health resort, and is largely patronized in the summer season, for the purposes of recreation, pleasure, and health, to accommodate which demand many cottages have been built on the lake shore; that the waters of the lake are used by such occupants, including plaintiff, for the purposes of boating, fishing, bathing, general recreation, and for domestic and household purposes.

It is further charged that defendant corporation has for more than twelve years annually cut and removed therefrom more than seventy-five thousand tons of ice, and shipped the same to St. Paul and distant markets, and disposed of the same for commercial purposes, is still engaged in the act of removing large quantities of ice for such commercial purposes, and that by the opening of large areas of water to the action of the air, great quantities of water evaporated annually. It is further

stated that the action of defendant in so removing the ice for the period of twelve years has had the effect of reducing the waters more than two feet, resulting in exposing shoals and bars, causing weeds to grow on the exposed shores, and rendering the beach and shore unsightly, and unfit for pleasure and health. It is alleged that, since defendant commenced to take out the ice as stated, there has been no overflow from the same through the natural outlet, and that the water level has been reduced below the natural outlet by the said acts of defendant.

As special damages thereby caused to plaintiff it is alleged that plaintiff had constructed a bathhouse and pier for the requirements of bathing and boating, and that when so constructed the water at such points was two feet in depth, and as a result of defendant's acts, in so lowering the lake, there has been exposed in front of plaintiff's premises an unsightly bar of sand, in width one hundred and fifty feet, and that in order to reach the water it is necessary to extend the pier, and that such improvements are being rendered useless, to defendant's damage of two thousand five hundred dollars. The action is ⁵⁰ brought to restrain defendant from further cutting and removing ice.

To this complaint defendant demurred upon four separate grounds: 1. That the complaint does not state facts sufficient to constitute a cause of action; 2. Defect of parties defendant; 3. Defect of parties plaintiff; 4. That plaintiff has no legal capacity to sue. The court below sustained the demurrer, and plaintiff appealed.

In respect to all bodies of public water, in common with riparian owners, the public have the ordinary rights of usage. These include the right of boating, fishing, and the use of the water or ice for the ordinary purposes. In these respects a riparian owner has no exclusive or peculiar privileges. There are certain interests and rights vested in the shore owner which grow out of his special connection with such waters as an owner. These rights are common to all riparian owners on the same body of water, and they rest entirely upon the fact of title in the fee to the shore land. Among such may be mentioned the right of accretions and the right of access. Again, there may be certain special rights peculiar to each shore owner according to the nature of his possession, which includes the character and value of his improvements. It is elementary that the shore owner may prevent an injury to his land by the lowering or raising of the waters beyond the natural limits of low and high water

mark, by artificial means, not in the exercise of rights common to all, unless such act be expressly authorized by law. The extent of the injury depends upon the condition of the shore land and the nature of the possession. If there is a remedy for an injury caused by the artificial raising of the water above the natural line, thus flooding a meadow, there is also a remedy to prevent exposure of an unsightly and unhealthy marsh by artificially drawing off the water below the natural level. It is immaterial for what purpose the shore land is used, if it be a lawful use. There is no distinction in this respect between a farm and a summer residence. Employment of contiguous land for the purpose of pleasure, recreation, and health constitutes such a use of adjacent bodies of public water as to command ⁵¹ a remedy for an interference with its natural condition: *Kimberly etc. Co. v. Hewitt*, 79 Wis. 334, 48 N. W. 373.

But even if plaintiff is in a position to call upon the courts to redress an injury caused in this manner, it is claimed by defendant that it is justified in what it has done, and in continuing so to do in the future because it is only enjoying the common privilege open to the public.

Defendant is mistaken in its view of the nature of the common or public privilege of taking water or ice from the lake. Such privileges are limited to those rights which are enjoyed by the public in common with riparian owners. This privilege is based upon the consideration of its personal nature; such a right as may be ordinarily used. Any man, woman, or child is accorded an equal opportunity in the use of such advantages. The door is shut to no one, if the means of access have been provided. But the very purpose which has caused the development of the law establishing the right would be destroyed if the principle were extended to protect an unlimited traffic by shipment to a distant market. The taking of ice for the purpose of shipment to a distant market, for the purpose of sale, without regard to its effect upon the common user, is not the exercise of a common right. It is true that public waters are free and open to all for commercial purposes to the extent that common rights are not encroached upon. The taking of water or ice by common right may result in destroying the source of supply, and no riparian owner or other common user can complain. But when use is made of such water for commercial purposes, not of common right, then the right to so use ceases

at the point where the conflict of interest with the common user commences.

It is true that the public itself may grant the right to do that which could not otherwise be lawfully done: *Minneapolis Mill Co. v. Board of Water Commrs.*, 56 Minn. 485, 58 N. W. 33. But the defendant does not claim the benefit of any such statute. On the contrary, appellant invoked to his aid Special Laws of 1881, chapter 410, which declares that White Bear lake shall forever remain free and open for the common and public use of all citizens of this state; and it is further provided that the waters of said ⁵²² lake shall never be lowered or diminished by any artificial means, and be connected with, used, or applied to any use or purpose, public or private, by any person, persons, or corporation, public or private. This is a public act, dealing with the interest of the general public, and it was not necessary to plead it.

While plaintiff has a remedy independently of this statute, he is nevertheless protected by its provisions. If there is any remedy under this act for the taking of the waters of the lake by the ordinary users by common right, the state is the only party which could enforce the remedy. But the law also prohibits the taking of water by artificial means, and if such taking by artificial means results in special injury to a riparian owner, as alleged in the complaint, then such owner may sue in his own name to enforce that which is declared unlawful by the statute. Within the meaning of this act, the taking of ice as a business, for shipment to a distant market for sale, is not an ordinary use of the waters by common right, but is an artificial taking.

After what has been written, it is evident that there is no defect of parties plaintiff in this action, since the plaintiff has shown himself specially affected by defendant's acts, on account of his peculiar relations to the water, not shared in common by other shore owners. It is equally clear that there is no defect of parties defendant. So far as the complaint discloses, the use made of the waters by other persons is only such use as by common right they are entitled to.

We come now to the final position taken by respondent, and that is, conceding all other questions, still the complaint does not constitute a cause of action, because no substantial decrease in the water of the lake has been shown as a result of defend-

ant's act in cutting ice. The learned trial judge seems to have disposed of the case upon this theory. Taking judicial notice that a cubic foot of water weighs, in round numbers, sixty-two and a half pounds, and that water expands one-eleventh in freezing, a computation shows that seventy-five thousand tons of ice, when reduced to water, would amount to about one-quarter of an inch, when spread over the entire area of the lake. In the twelve years this would amount to three ⁵³ inches. So small an amount of water was considered trifling, and not likely to affect plaintiff's property. This computation, however, does not take into account the amount of evaporation caused by removing the ice, and thus exposing the water to the air.

It is further claimed that the constant falling of the water was due to other natural causes, such as the effect of drainage and tilling of the land. In thus considering the question, an important consideration has been overlooked. It is positively alleged in the complaint that during the twelve years there has been no water flowing out of the lake, the water level always being below the natural outlet. If this be true, then all of the natural increase by rainfall, snow, and springs would tend to increase the volume, unless the increase were overbalanced by the natural decrease. To whatever extent the water was reduced by defendant, to that extent the level was reduced below the natural condition. In other words, if defendant had not removed the three inches of water, that much additional water together with whatever, if any, was lost by the alleged artificial evaporation, would still be in the lake. It would be different in the case of a running stream, where the amount taken would be immediately supplied. Here plaintiff is entitled to the natural condition and only asks that the result be not made worse by artificial means.

The amount of water taken is not material. If the interference is persistent, and substantially reduces the natural level of the lake, it is sufficient. If there was a fall of two feet in twelve years, according to the mathematical demonstration submitted by respondent, defendant is charged with causing one-twelfth of that amount. While such amount averages small for each year, yet it is definite, persistent, and, if continued, will be serious. Such an interference is not trivial. It is substantial. The amount of damages in such cases is

not material, if it be some definite amount: *Potter v. Howe*, 141 Mass. 357, 6 N. E. 233. The complaint complies with these requirements, and states a good cause of action.

Order reversed.

MR. JUSTICE LOVELY and Mr. Justice Brown dissented on the ground that the majority opinion was wrong both upon principle and authority. They cited *Lamprey v. State*, 52 Minn. 181-198, 38 Am. St. Rep. 541, 53 N. W. 1139, and *Peoples v. Davenport*, 149 Mass. 322-324, 14 Am. St. Rep. 425, 21 N. E. 386, to the effect that in those states where the title to the bed of a navigable lake or stream is held to be in the state, the waters thereof are public property, held by the state in its sovereign capacity as trustee for the public use, and the right to take ice for sale or use, or to use the waters for fishing, boating, and other lawful purposes, is common to all, and in such waters or ice the riparian owners have no special or superior right.

"But it is held in the majority view that a necessary distinction exists as to the limit of the use by the public, and that ice cannot be taken by the public from these lakes for such use in unlimited quantities, although we are left entirely in the dark as to what would be a proper or limited use, as distinguished from an improper and unlimited use. The legislature has not regulated this subject, and, if this court can do so, its conclusions must rest wholly upon the facts as alleged in the complaint—that the quantity taken by defendant, 'more than seventy-five thousand tons of ice annually, and after storing a large portion of the same in icehouses for the time being, defendant has shipped away to St. Paul and more distant marts of commerce, and disposed of the same for commercial purposes, at remote points from the shores of said lake, where no part or portion of the same can be returned to said White Bear lake.' And while other causes, as set forth in the complaint, and conceded, have lowered the lake in question to the extent stated in the majority opinion, yet it was admitted by counsel on the hearing that the removal of ice therefrom by the defendant against whom the injunction is sought had only diminished the shore line, by its acts, one-quarter of an inch each year, which seems to us an insufficient basis entirely to destroy a valuable business by injunction, simply because it might be unreasonable in a case where no limit has been fixed upon the common right.

"The easy solution that suggests itself, by reason of the capacity of one person to take more ice than another, where no limits are prescribed in the law, is not by injunction to restrain a right which is common, and the effort to do so in this case gives to the shore owner a special privilege, which depends entirely upon the extent of his improvements; and this is the contention of the appellant,

for upon no other ground can the relief granted be sustained. And the majority opinion is an adoption of the doctrine that the riparian owner, by reason of extensive improvements upon his property, placed there for comfort and pleasure during the summer season, has special rights and privileges superior to the public, and other, but less pretentious, shore owners, who have not made improvements of the same character.

"We are unable to give weight to the considerations which control the majority of the court. We regard the public waters of this state as the common property of all the people to the extent of such natural and reasonable uses as the necessities of life require, and it seems to us that such uses by the common people are a reality rather than a legal myth, and paramount to the individual whims, caprices, and pleasures of those who adapt their own property to luxuries. Compared to the practical benefits which the use of ice affords to the inhabitants of the cities adjoining White Bear lake, the advantages and pleasures of any shore owner are insignificant. And when a step is taken in the direction of destroying the rights of the many for the exclusive benefit of the few, by means of an injunction restraining the cutting of ice which will result in lowering the lake only one-fourth of an inch, it seems to us that there is a plain requirement for the application of the rule, 'De minimis non curat lex.'

"If the right to take ice is a public right, as conceded, this court has no authority to say how much or how little any person can take for public use. In the absence of legislative regulation, if any unreasonable use is made of public waters, and public injury follows, the remedy belongs to the public, as in other cases of public wrongs and nuisances: *Inhabitants v. Stoddard*, 7 Allen, 158-170. But to concede that ice may be taken from these lakes for common use by 'every man, woman, and child,' and to hold that such right is limited, or in this case denied, to the defendant, without fixing the limit, is, in effect, to give to the public a privilege which they cannot enjoy.

"But if the necessity for the use is the test—and we apprehend that the legislature and the courts can make no other—there is nothing in the complaint that charges any unreasonable usage beyond such necessity, or extends such appropriation further than the natural and ordinary uses to which the commodity is applied, and we do not suppose that anyone will claim that an unnecessary or unreasonable use will be assumed where it is not alleged. If ice cannot be taken in the way adopted by defendant, as set forth in the complaint, for use by the residents of the large cities adjoining White Bear and other lakes in their vicinity, there would seem to be but one resource left—to manufacture that commodity, as in southern climates—which would be very expensive, and a deprivation of its benefits to many; and, if the complaint which is upheld in this case furnishes the criterion of limitation

to be applied, the means—even of ice manufacture must not be taken from the lakes or streams, but the consumer must depend upon the beneficence of heaven, rather than the bounteous earth, to furnish rain for that purpose, before it has fallen into these waters and become a part thereof. This rather far-fetched conclusion seems to us but the logical *reductio ad absurdum* of the claim presented in the complaint.

"We should long hesitate to accept a rule that would work such an injustice to the inherent rights of our people, and we do not see any particular force in the distinction between the right of the individual living in the cities adjoining the lake to take water or ice therefrom personally, and forbids him the same right when derived through the customary methods. It requires no stretch of fancy to recognize the well-known fact that but few take ice from the public waters, and place the same in receptacles for their consumption. The use of ice by the citizen, which is almost as necessary as water, depends upon the intervention of those who are engaged in the business of cutting and storing it for delivery to private persons. In a measure, such persons are the agents of all who need ice, and upon whom the people rely and depend to obtain that necessity. Such a course reduces the price of the commodity, and furnishes benefits much more advantageously than if each individual was required to do that which many are not able to do. And if the private individual has a right to take ice for his own use, and several cannot do the same thing through another, it is, in the way we live and move and have our being at the present day, a very barren right to each.

"We do not think there is any weight in the suggestion that there is no outlet to White Bear lake. It is conceded to be a public body of water, and the fact that it has no outlet is wholly irrelevant to the question. The truth undoubtedly is that this lake is fed by springs, and, like many others of the public waters of this state, by reason of the cultivation of the soil, evaporation, and other causes, has to some extent receded in the quantity of its waters, although by acts of defendant to no greater extent than three inches in twelve years, or one foot in fifty years.

"The principles which we have stated above are not new, but are supported by an unbroken line of authorities of the most respectable courts in this country: Gould on Waters, 3d ed., sec. 191; Brastow v. Rockport, 77 Me. 100; Woodman v. Pitman, 79 Me. 456, 1 Am. St. Rep. 342, 10 Atl. 321; McFadden v. Haynes, 86 Me. 319, 29 Atl. 1068; Inhabitants v. Stoddard, 7 Allen, 158; Paine v. Woods, 108 Mass. 160; Hittinger v. Eames, 121 Mass. 539; Wood v. Fowler, 26 Kan. 682, 40 Am. Rep. 330; Bosse v. Thomas, 3 Mo. App. 472; Brown v. Cunningham, 82 Iowa, 512, 48 N. W. 1042."

ICE.—THE PRIVILEGE OF GATHERING ice from public waters, either for use or sale, is generally considered a common

right, and the ice belongs to the first appropriator: *People's Ice Co. v. Davenport*, 149 Mass. 322, 14 Am. St. Rep. 425, 21 N. E. 385; notes to *Higgins v. Kusterer*, 32 Am. Rep. 164; *Miller v. Mendenhall*, 19 Am. St. Rep. 235; *Woodman v. Pitman*, 1 Am. St. Rep. 352.

ERICKSON v. GREAT NORTHERN RAILWAY CO.

[82 Minn. 60, 84 N. W. 462.]

NEGLIGENCE—INJURY TO CHILD FROM DANGEROUS PREMISES—PLEADING.—In an action to recover for the death of a child caused by playing with fire set by a railroad company upon its right of way, upon the ground that the right of way was not fenced, and also that the fire was left unguarded, a complaint which does not allege any facts showing that the child went upon the right of way at any point which it is alleged was not fenced, or at any point which the company might lawfully have protected by a fence, does not state a cause of action.

NEGLIGENCE — INJURY TO CHILD FROM DANGEROUS PREMISES.—A railroad company does not owe any legal duty to children or others, to exercise extraordinary care by guarding fires set upon its right of way, so that if being attracted thereby they intrude upon the right of way to play with the fire, they shall not be injured thereby. The doctrine of the "turntable cases" does not apply to such a case, and must be limited to cases of attractive and dangerous machinery, and to other similar instances where the danger is latent.

H. V. Mercer, for the appellant.

W. E. Dodge, for the respondent.

⁶¹ **START, C. J.** The plaintiff's intestate was a child four years old, who on September 15, 1899, while playing with fire on the defendant's right of way, was so seriously burned that she died. This action was brought to recover damages for the benefit of her next of kin, on the ground that her death was due to the negligence of the defendant. On the trial the court sustained the objection of the defendant to the admission of any evidence, on the ground that the complaint did not state facts constituting a cause of action, and ordered judgment for the defendant. The plaintiff appealed from an order denying his motion for a new trial.

The complaint, after alleging that the defendant owns and operates a railroad through the village of Milaca, this state, and ⁶² that the plaintiff was the father of the child, and had been duly appointed administrator of her estate, alleged sub-

stantially these facts: On the fifteenth day of September, 1899, it was the duty of the defendant to keep its right of way in the village of Milaca fenced, but it unlawfully and negligently failed to fence its right of way, or any portion thereof, in such village. On the right of way north of the depot of its railway, near a public street, which was used for travel, and near several dwelling-houses occupied by people having children of immature years, and on September 13th, the defendant negligently caused fires to be set to three piles of stumps and rubbish then upon its right of way, and it negligently left the fires burning and unguarded until on and after September 15th. At the time the fires were set, and for a long time prior thereto, its right of way at this place had not been fenced, and was then open and entirely without fence, and was located about the center of the village of Milaca. This location on its right of way had long been a common playground for the children of tender years living near by, all of which was well known to defendant. But the plaintiff's intestate had not played thereon prior to September 15th. If its right of way had been well and properly fenced at such point the children could not, and would not, have gone thereon to play at any time, and the deceased child would not have gone thereon to play, as she did on September 15th. The fires so set and so left burning were attractive to children of tender years, and had a strong tendency to allure them to play in and around the fires, and thus allure and entrap them into great dangers which were a menace to their lives, and which, by reason of their tender years and immature judgment, they could neither apprehend nor appreciate, all of which was well known to the defendant, whereby the deceased was induced to and did so enter upon the right of way of the defendant to play in and with the fires so set, without knowing the danger thereof, and thereby her clothing was set on fire, and she was so badly burned that she died as a result of such injuries. It was the duty of the defendant to refrain from setting such fires, unless they were properly guarded, and it was its duty to have prevented the child from going upon its right of way and playing around the fires. But it negligently set the fires and ⁶³ negligently permitted them to burn without being guarded, and it thereby invited her upon its premises to play in and around the fires.

1. It is claimed by the defendant that the complaint does not allege any facts showing that the child went upon its right of way at any point which it is alleged was unfenced, or at any point which it might lawfully have protected by a fence. A majority of the justices of the court are of the opinion that this contention is correct.

It is true that the complaint alleges that it was the duty of the defendant to keep its right of way in the village of Milaca fenced, and that it negligently failed to fence any portion in such village; but it was necessary for the plaintiff to allege with reasonable certainty the place where the child entered upon the defendant's right of way, so that the defendant might allege and show, if such were the fact, that such place was its depot grounds or a public street, which public convenience required to be left open, and which it was therefore not only not bound to fence, but which it had no right to inclose. Now, for aught that appears from the allegations of the complaint, the child may have gained access to its right of way from the defendant's depot grounds or a public street. The conclusion alleged in the complaint that, if the right of way had been fenced at the place on its right of way where the fire was left burning, the child could not, and would not, have gone thereon to play, cannot be construed as an allegation of fact, to the effect that she entered upon the right of way at the point where the fire was. On the contrary, it is affirmatively alleged that the place in question was "on the said right of way north of the depot of said railway near a public street which was used for travel," and was located about the center of the village.

Such being the case, and there being no direct allegation as to the point where she entered upon the premises of the defendant, if any inferences are to be indulged as to the point of entry it is not unreasonable to infer that she entered from the street. The court therefore holds that, in so far as the plaintiff's alleged cause of action depends upon the neglect of the defendant of its statutory duty to fence its right of way, the complaint does not state ⁶⁴ a cause of action. Whether the absence of the fence, if such were the case, was the proximate cause of the child's injury, we do not decide: See *Nelson v. Chicago etc. Ry. Co.*, 30 Minn. 74, 14 N. W. 360.

I dissent as to the court's construction of the complaint. The question was raised for the first time on the trial of the

action, and if, even argumentatively, the complaint states a cause of action, it ought to be sustained. I am of the opinion that the fair inference from all of the allegations, considered together, is that the child entered upon the right of way at the place where it was the duty of the defendant to maintain a fence, and that it did not do so.

2. The only other question necessary to be considered is, Was the defendant guilty of actionable negligence, independently of any question as to its statutory duty to fence its right of way, in setting the fires and leaving them unguarded at the place and under the circumstances alleged in the complaint. It was not, unless the allegations of the complaint in this respect show that the defendant failed in some duty which the law imposed upon it, or, in other words, show that it owed a legal duty to the class of children to which the plaintiff's intestate belonged, in the exercise of due care, to prevent them from coming in contact with the fires. The question then is, Did the defendant owe a legal duty to this child and others, to exercise ordinary care by guarding the fires so that, if they intruded upon its land to play with the fires, they would not be injured thereby?

The tender and loving regard which every true man has for children and his impulse to protect them from harm are liable, unless repressed, to lead courts to an unsound conclusion on questions of this character. It is important, then, to inquire dispassionately just what the defendant did, according to the allegations of the complaint. It set fire to rubbish on its right of way, presumably for the purpose of getting rid of it. In so doing it was executing upon its own premises, in a lawful way, necessary work. It exercised no actual force against the child, and the danger of injury from the fire was not concealed. The child was an intruder upon the defendant's land, and by her own act was injured by meddling ⁶⁵ with the fire. It is true, she knew no better, and was an innocent trespasser, but the innocence of the intruder in cases of this kind does not necessarily establish the legal duty of the land owner to protect him from injury. The law does not, as a general rule, impose restraints and conditions upon an owner's lawful and necessary use of his land, which is only dangerous to persons who intrude thereon: See 11 Harvard Law Review, 349, 434.

But a notable exception to this rule was declared by this court, as early as 1875, in the leading case of *Keffe v. Mil-*

waukeee etc. Ry. Co., 21 Minn. 207, 18 Am. Rep. 393, which was to the effect that the owner of dangerous machinery (a turntable), who leaves it unfastened or unguarded on his own land, where he has reason to believe that young children will be attracted to play with it, is bound to use due care to protect such children from the danger to which they are thus exposed. The basis of this decision was that the turntable, when left unfastened, was attractive to young children, and that the owner, by leaving it unguarded, was not only inviting young children to come upon it, but was holding out an allurement which, acting upon the natural instincts by which such children are controlled, drew them into a hidden danger. This exception to the rule of nonliability of land owners for injuries sustained by trespassers from the condition of their premises, or, as it is usually expressed, the "doctrine of the turntable cases," has never been extended by this court to cases like the one at bar, or to any others which upon their facts did not come strictly and fully within the Keffe case: *Stendal v. Boyd*, 67 Minn. 279, 69 N. W. 899. In *Emerson v. Peteler*, 35 Minn. 481, 59 Am. Rep. 337, 29 N. W. 311, which was a case where a child five years old was killed by climbing upon a portable dump-car, the court declined to apply the doctrine of the Keffe case, and stated that the basis of liability in the latter case was that the premises were such as to invite the presence of children, and the danger was not apparent, but concealed. In *Twist v. Winona etc. R. R. Co.*, 39 Minn. 164, 12 Am. St. Rep. 626, 39 N. W. 402, the court stated the necessity of limiting the doctrine in these words: "To the irrepressible spirit of curiosity and intermeddling of the 'average boy, there is no limit to the objects which can be made attractive playthings. In the exercise of his youthful ingenuity, he can make a plaything out of almost anything, and then so use it as to expose himself to danger. If all this is to be charged to natural childish instincts, and the owners of property are to be required to anticipate and guard against it, the result would be that it would be unsafe for a man to own property, and the duty of the protection of children would be charged upon every member of the community except the parents or the children themselves. This court itself, if it had not modified the Keffe case, has at least indicated that the doctrine which it announces is not to be given any such extreme and unlimited application."

In *Haesley v. Winona etc. R. Co.*, 46 Minn. 233, 24 Am. St. Rep. 220, 48 N. W. 1023, the court held that a railroad company was not guilty of negligence, as to young children, by leaving cars on a gravity track, with the brakes set, which were loosened by them, whereby one of their number was killed. Again, in the case of *Ratte v. Dawson*, 50 Minn. 450, 52 N. W. 965, it was held that a land owner was not liable in damages for the death of a child three years old, caused by the caving of an unguarded embankment on his premises, made by excavations for sand. In *Stendal v. Boyd*, 73 Minn. 53, 72 Am. St. Rep. 597, 75 N. W. 735, the court refused to extend the doctrine of the turntable case so as to include an unguarded pond caused by the excavation in a stone quarry which had been abandoned. The court in that case said: "The liability of the land owner to children who are induced to come upon his premises by reason of attractive and dangerous machinery thereon was carefully limited in the original decision, and the limitations have been enforced by the subsequent decisions of this court. . . . The doctrine of the turntable cases is an exception to the rule of nonliability of a land owner for accidents from visible causes to trespassers on his premises. If the exception is to be extended to this case, then the rule of nonliability as to trespassers must be abrogated as to children, and every owner of property must, at his peril, make his premises childproof. . . . It would seem that there is no middle ground and that the doctrine of the turntable cases ought to be limited to cases of attractive and dangerous machinery."

The suggested limitation necessarily had no reference to cases where the danger was not open, but concealed. This court also refused to extend the doctrine to a case where a child was injured ⁶⁷ by falling from an unguarded retaining wall seven and one-half feet high: *Kayser v. Lindell*, 73 Minn. 123, 75 N. W. 1038.

It is not practicable to lay down any absolute rule as to the limitations of the doctrine. The manifest trend, however, of all the decisions of this court is to limit its application to attractive and dangerous machinery, and to other similar cases where the danger is latent. We are not prepared to say that cases may not arise outside of this classification to which the doctrine ought to be extended, but we do hold that, as a general rule, the doctrine of the turntable cases must be limited to cases of attractive and dangerous machinery, and to other

similar cases where the danger is latent. This rule may not be strictly logical, but it is a necessary one, unless land owners are to be made insurers of the safety of children when trespassing upon their premises. It necessarily follows that this case falls within the limitation, and that the defendant was not bound to exercise ordinary care to so guard the fire on its right of way that children intruding thereon could not come in dangerous contact with the fire, though induced so to do by its attractiveness. Therefore, the complaint does not state a cause of action.

Order affirmed.

LEWIS, J., dissenting. The complaint states that at the place where the fires were set the right of way was not fenced; that said location was on the right of way, and had long been a common playground for young children living in the vicinity; and that, if the said right of way had been properly fenced at the said point, the deceased would not have gone thereon to play at the time of the accident. These allegations, together with the statement that the child entered upon the premises and played around the fire, being attracted thereto, are sufficient to constitute a declaration that she went to the fire at a point where the right of way was not fenced. Upon that point I dissent from the views of the majority of the court.

DANGEROUS PREMISES.—LIABILITY OF THE OWNER of dangerous premises to trespassers does not exist, even in the case of children, unless they are induced to enter upon the land by something unusual and attractive placed upon it by the owner, or with his knowledge permitted to remain there: *Cooper v. Overton*, 102 Tenn. 211, 73 Am. St. Rep. 864, 52 S. W. 183. See, further, *Arnold v. St. Louis*, 152 Mo. 173, 75 Am. St. Rep. 447, 53 S. W. 900; extended note to *Barnes v. Shreveport*, 49 Am. St. Rep. 423-426.

DEERING HARVESTER COMPANY v. DONOVAN.

[82 Minn. 162, 84 N. W. 745.]

JUDGMENTS, VACATING—EFFECT OF.—If a person, by judgment in claim and delivery proceedings commenced without his knowledge or consent, obtains possession of personal property which he retains he cannot, by motion, without a return or offer to return the property, have the judgment and proceedings set aside, on the ground that they were taken without his knowledge or authority, and the judgment upon such motion is conclusive of the right of the defendant in the claim and delivery proceedings to the return of the property.

J. A. Coller and E. and W. N. Southworth, for the appellant.

W. C. Odell, for the respondent.

162 BROWN, J. Action in claim and delivery for the possession of a harvester and binder. The property was taken in the proceedings, and delivered to plaintiff, and plaintiff has since retained it. Defendant had judgment in the court below for the return of the property, or its value, and plaintiff subsequently moved the court, upon affidavits and the judgment-roll, to set the judgment and all prior proceedings aside, on the ground that the action was commenced and prosecuted without its knowledge or consent, and was wholly unauthorized. The motion was denied, and plaintiff appeals.

The court found as a fact that the action was brought without plaintiff's knowledge or consent, but denied the motion on the **163** ground that plaintiff had not returned, or offered to return, to defendant the property taken in and the subject of the action, which plaintiff still retains. The short facts in the case are that one Weibeler was the local agent of plaintiff at Belle Plaine, this state, for the sale of its harvesting machines in that territory. As such agent, with the assistance of one of plaintiff's traveling agents, it is claimed, Weibeler bargained and sold one of plaintiff's harvesters and binders to defendant, the purchase price agreed upon being ten dollars in cash at date of sale, a black mare, and twenty-five dollars due at a future date. The machine was delivered to defendant, who paid the ten dollars, and delivered to the agent the black mare. Not being satisfied with the mare, and claiming she did not conform to defendant's representations, the agent

refused to accept her, and attempted to rescind the contract. Defendant refused to consent to a rescission, or to return the machine, and this action was brought to recover it.

Plaintiff did not authorize the commencement of the action, and knew nothing about it until after the entry of the judgment, but by means thereof obtained the possession of the machine, and has not offered to return it to defendant. The judgment awarding to defendant the return of the machine is conclusive upon the parties in so far as this motion is concerned, and plaintiff cannot, until it complies therewith and returns it to defendant, be heard to complain of the result of the action. Plaintiff has obtained the fruits of the litigation, and though the action was wholly unauthorized, must restore the same to defendant before the relief sought by this motion can be granted. The principle which controls the case is laid down in *Anderson v. Johnson*, 74 Minn. 171, 77 N. W. 26.

Counsel for plaintiff contend that the contract of sale was invalid; that defendant acquired no title to the machine; and that plaintiff, in retaining the same, is doing no wrong, and is holding only that which is its own. The question as to the validity or invalidity of the sale cannot be determined on this motion. Defendant is entitled to have that question settled in the usual way—by trial in court before a jury, and not upon affidavits. Whether the sale was valid or invalid, the fact remains that a contract of ¹⁶⁴ sale was entered into between defendant and plaintiff's agent, the machine in question was delivered to defendant in pursuance thereof, and was subsequently taken from him by the proceedings in this action, and delivered to plaintiff. The judgment orders the machine returned to defendant, but plaintiff neglects to do so, and, with the fruits of the litigation in its possession, asks to be relieved from the judgment on the ground of want of authority of its agent to commence the proceedings. There is no question but that the machine was in fact delivered to plaintiff, or its general agent, after it had been taken from defendant. It is not important what has since become of it. Defendant is in no way responsible for its present whereabouts, and should not be made to suffer because plaintiff is unable to locate it. If plaintiff cannot now return the machine because it cannot be identified or located, or for any other reason, it is its misfortune, due entirely to the misconduct and neglect of its own agent. Plaintiff learned, upon discovering the judgment, that the machine

had been taken from defendant, and that a return thereof was ordered by the terms of the judgment. The suggestion, therefore, that it did not know at the time of making this motion that the machine had been delivered to its general agent or returned to it, comes with no particular force. Inquiry of its local agent would have disclosed the fact. *Burchard v. Hull*, 71 Minn. 430, 74 N. W. 163, *Dexter v. Morrow*, 76 Minn. 413, 79 N. W. 394, and *White v. Madigan*, 78 Minn. 286, 80 N. W. 1125, are not in point. There was no showing in either of those cases that the principal received the benefits of the unauthorized acts of the agent.

Order affirmed.

JUDGMENTS.—ON VACATING and setting aside judgments, see the monographic notes to *Furman v. Furman*, 60 Am. St. Rep. 633-663; *Nicklin v. Robertson*, 52 Am. St. Rep. 795-799; *Burnham v. Hays*, 58 Am. Dec. 392-398.

ERTZ v. PRODUCE EXCHANGE COMPANY.

[82 Minn. 173, 84 N. W. 743.]

MONOPOLIES — COMBINATION IN RESTRAINT OF TRADE.—A corporation or combination which regulates the credit to be allowed its members, discriminates in the price to be paid for produce against persons not members, controls the delivery of such produce, and provides a penalty by boycott, fine, and suspension, for offending and defaulting members, is in restraint of trade, tends to limit or control the market price of produce, and is illegal.

MONOPOLIES — COMBINATION IN RESTRAINT OF TRADE—BOYCOTT—ESTOPPEL.—An ex-member of an unlawful combination in restraint of trade, who participated in the adoption of its constitution and by-laws, is not estopped to maintain an action against such association for damages for being boycotted by it after his expulsion for a violation of such by-laws.

J. Robertson and M. C. Brady, for the appellant.

Stiles & Stiles, for the respondent.

¹⁷⁶ LEWIS, J. The Produce Exchange Company of the city of Minneapolis is a corporation, and its by-laws provide certain restrictions and limitations as to the method of doing business by its members, the more important of which are as follows:

"COLLECTION DEPARTMENT RULES.**"Article 1.—City Customers.**

"Section 1. All bills for goods sold on credit the six preceding business days to Friday night of each week to customers doing business within the limits of the cities of Minneapolis, St. Paul, St. Anthony Park, Merriam Park, St. Louis Park, Hopkins, New Brighton, Hamline, Wayzata, Lake Park, Robbinsdale, and all lake hotels shall be considered due and payable on the Monday next succeeding such sale, and, unless paid on or before two P. M. of the succeeding Wednesday, the name of the person or firm owing such account shall be reported to the secretary of the produce exchange as delinquent in payment of the same.

"Sec. 2. Any party being delinquent at three consecutive meetings shall be put on the permanent cash list, and shall be sold for cash only. Such party may, after paying all bills, make application in writing to the secretary to be taken off the list. A majority vote of the members at a regular meeting may remove such delinquent name from the permanent cash list.

"Sec. 7. Any person, firm, or corporation, other than members of this exchange, now engaged or that subsequently engages in the wholesale fruit and produce commission or brokerage business in this city shall be considered on a parity with delinquents."

"Article 15.—Purchases from Nonmembers.

"Section 1. All members of the collection department desiring to purchase butter or eggs of any parties, not members of this exchange, offering said goods for sale in this city, shall not pay within one cent per pound on butter and one cent per dozen on eggs of the official quotations of this exchange on the day of purchase. Nonmembers may register their names with the secretary, agreeing to sell their butter and eggs exclusively to members of the exchange; and, when such registration is reported by the secretary, the above rule will not apply.

"Sec. 2. Any member violating section 1, article 15, shall be subject to a fine of not less than five dollars nor more than twenty-five dollars."

"Article 16.—Produce Exchange of St. Paul.

"The officers of this exchange are empowered at their discretion ¹⁷⁷ to enforce jointly any agreement entered into with

the officers of the Produce Exchange of St. Paul for our mutual protection and benefit.”

“Article 12.—Penalties.

“Sec. 4. When goods are sold for delivery on the following Monday, any house delivering such goods before that day shall pay to the secretary a penalty of five dollars for each violation. . . .

“Sec. 6. Any member or firm guilty of willful violation of any rule of the collection department after investigation by the board of directors, shall be fined not less than five dollars nor more than twenty-five dollars, or for repeated willful violations of the rules shall be fined not less than twenty-five dollars nor more than one hundred dollars, and so reported by the board to a meeting of the collection department of the produce exchange, to be confirmed by a plurality vote of all members present. In the default of payment of the fine imposed, said members shall immediately forfeit his or their membership to the exchange. It is further agreed and understood that all members shall immediately discontinue all business relations with said defaulting member until said membership has been fully restored.”

Appellant, a commission merchant, was a member of this organization, and on July 5, 1899, was accused of selling produce contrary to the provisions of the by-laws, and he was fined twenty-five dollars under the penalty clause. Refusing to pay the fine, he was suspended, and ceased to be a member after July 19, 1899. This action is brought to recover damages from the corporation and its members for combining and conspiring to ruin his business by not selling to, or buying from, plaintiff any merchandise or produce, and in influencing others not to have dealings with him. The complaint was sustained as to a demurrer upon a former appeal: *Ertz v. Produce Exchange*, 79 Minn. 140, 79 Am. St. Rep. 433, 81 N. W. 737. The cause coming on for trial in the court below, a verdict was directed for defendant, and the plaintiff appeals.

There are two questions presented for review: 1. Was the produce exchange organized as an illegal combination? And 2. Was plaintiff *pari delicto* by virtue of having been a member?

1. Laws of 1899, chapter 359, is an act to prevent organizations and ¹⁷⁸ trusts, and to prevent the same under certain

circumstances from doing business or enforcing contracts. Section 1 reads as follows: "Any contract, agreement, arrangement, or conspiracy, or any combination in the form of a trust, or otherwise, hereafter entered into which is in restraint of trade or commerce within this state, or in restraint of trade or commerce between any of the people of this state and any of the people of any other state or country, or which limits or tends to limit or control the supply of any article, commodity, or utility, or the articles which enter into the manufacture of any article or [of] utility, or which regulates, limits, or controls, or raises or tends to regulate, limit, control, or raise the market price of any article, commodity, or utility, or tends to limit or regulate the production of any such article, commodity, or utility, or in any manner destroys, limits, or interferes with open and free competition in either the production, purchase, or sale of any commodity, article, or utility, is hereby prohibited and declared to be unlawful."

The by-laws of the company above quoted regulate the credit that shall be allowed its members, and provide a penalty for violation by removing the privilege of credit. This regulation also applies to dealers not members. Members are required to purchase produce from persons not members at a less price than that quoted by the organization. A penalty for a violation of this rule is a fine of five dollars to twenty-five dollars. If any member deliver goods before the following Monday when sold for delivery on that day, a fine of five dollars is provided. If the fines are not paid, the offending member forfeits his membership, and "it is further agreed and understood that all members shall immediately discontinue all business relations with said defaulting member until said membership has been fully restored."

Here we find a complete scheme to control the produce trade of Minneapolis, St. Paul, and vicinity in favor of the members of the organization. Persons not members, offering produce for sale, are discriminated against, which is illegal; and if any one of the members refuses to carry out such illegal purpose, he is to be boycotted by all the other members. This is clearly a combination in restraint of trade, tends to limit or control the market ¹⁷⁹ price of articles of produce, and limits and interferes with open and free competition in the purchase and sale of commodities, and is prohibited by the act referred to.

The trial court appears to have taken this view, and counsel for respondent does not contend otherwise.

2. But it is claimed the plaintiff was a member of this illegal combination at the time the by-laws were adopted and set into operation, and for that reason the law will not furnish him a remedy. This is not a case calling for the application of any principle analogous to the equitable rule that he who comes into equity should come in with clean hands. The authorities cited in support of the proposition that plaintiff cannot recover because he is simply suffering an injury caused by a means in which he participated are not at all in point. In the principal case cited (*Beechley v. Mulville*, 102 Iowa, 602, 63 Am. St. Rep. 479, 70 N. W. 107, 71 N. W. 428), the court places the decision directly upon the fact that the revoking of the agencies held by the plaintiff was within the authority of the compact, and so plaintiff could not recover damages for the doing of that which he had agreed should be done. In that case the plaintiff directed to be done that which was done to him, and which would not have been done had he not so directed. Hence he could not complain of the consequences of his own acts. In this case plaintiff does not ask damages for suspending him from the association and depriving him of its privileges. The acts complained of were set on foot after he ceased to be a member, and he in no manner consented to participate or is responsible for them.

It does not follow that, because plaintiff was at one time a member of the illegal combination with intent to injure in this manner defaulting members, after ceasing to be a member he must suffer without redress at the hands of his former co-conspirators. It is immaterial whether the plaintiff voluntarily set in motion the proceedings which caused his suspension, desiring in good faith to withdraw from the association, or whether he was expelled for reasons beyond his control; the result is the same. There is nothing in the record to charge plaintiff with ¹⁸⁰ acting in bad faith—that he induced the boycott upon his business, thus laying the foundation for an action in damages. Under the conditions disclosed the law presumes good faith on his part, and will treat him as a reformer, and entitled to all the benefits of the reformation. The application of the principle invoked by respondent would

place a burden upon reformation and a premium upon wrongdoing.

Order reversed and a new trial granted.

TRUSTS AND MONOPOLIES.—What combinations constitute unlawful trusts and monopolies are discussed in the monographic note to *Harding v. Glucose Co.*, 74 Am. St. Rep. 235-273. See, also, the recent cases of *Cummings v. Union Blue Stone Co.*, 164 N. Y. 401, 79 Am. St. Rep. 655, 58 N. E. 525; *State v. Associated Press*, 159 Mo. 410, 81 Am. St. Rep. 368, 60 S. W. 91.

AFRICA v. DULUTH NEWS TRIBUNE COMPANY.

[82 Minn. 283, 84 N. W. 1019.]

CORPORATIONS—POWER OF OFFICER TO BORROW MONEY.—The president and general manager of a corporation who has the entire charge and control of its affairs, and who is the sole stockholder therein, has authority to make notes and borrow money thereon for the use and benefit of the corporation.

CORPORATIONS—NOTE PAYABLE TO OFFICER OF.—The note of a corporation made exclusively for its benefit, by an officer thereof, to himself as payee, is valid.

Fryberger & Johanson, for the appellant.

Baldwin & Baldwin, for the respondent.

²⁸³ **BROWN, J.** This action is one to recover upon defendant's promissory note. ²⁸⁴ The plaintiff had a verdict below by order of the court, and defendant appeals from an order denying a new trial.

The record discloses the following facts: Defendant is a corporation engaged in publishing a newspaper in the city of Duluth. During the time stated in the complaint one Thoits was its president, and as such had and exercised the general control and management of its affairs. In May, 1897, he entered into a contract with the corporation by which he purported to lease its property, and thereafter, and until subsequent to the time of the transaction in question, continued to manage and conduct its business, publishing the newspaper, and transacting all business of the company. It is practically agreed by both parties that the contract or lease was a mere cover to protect the corporation from libel suits, and the evidence shows beyond

any doubt that Thoits was conducting the business of the company, not under the lease in reality, but as its president and employé. Prior to the date when Thoits assumed charge, the corporation had contracted an indebtedness to the Mergenthaler Linotype Company in the sum of eight thousand dollars, which was represented and evidenced by eight promissory notes of the corporation, of one thousand dollars each. Thoits conducted the affairs of the company in the name of the corporation, deposited all money received by him in the course of the business in a bank in the name of "Duluth News Tribune, A. T. Thoits, Publisher," and his private funds in the same bank in his individual right. He had exclusive charge of the bank account of the company, and drew all checks in payment of debts contracted and incurred in the course of the business.

On May 21, 1898, he paid one of the one thousand dollar Mergenthaler notes out of the money by him deposited in the bank in the name of the corporation, and, to make good the amount so paid, borrowed of plaintiff one thousand dollars, and made and delivered to him the promissory note in suit. The money so borrowed was deposited in the bank in the corporation account, and used in and about its business. The promissory note so made and delivered to plaintiff is in the words and figures following, to wit:

285 "\$1,000.

Duluth, Minn., May 21, 1898.

"On demand, after date, we promise to pay to the order of A. T. Thoits one thousand dollars, at American Exchange Bank, value received, with interest before and after maturity at the rate of six per cent per annum until paid. Principal and interest payable in United States gold coin.

"DULUTH NEWS TRIBUNE CO.,

"By A. T. THOITS,

"Prest.

"Attest: EDWARD HAZEN."

Indorsed: "Pay to W. G. Africa. A. T. Thoits."

The defense to the action is that Thoits had no authority to make the note, and that it is void on its face, having been made by the president of the corporation to himself, and for his personal use and benefit. The evidence does not sustain the defense. The record does not show that Thoits had express authority from the corporation to execute the note; but that

is not important, as authority to do so must be implied from the nature and extent of his powers and duties as president and general manager of the company. As president and manager of the corporation, he had general and unrestricted charge and control of its affairs, and at the time of this transaction was the sole and only stockholder. At least, he testified that he was the only stockholder, and no attempt was made to show the contrary. The fact that Hazen and Congdon were directors, and that the statutes of the state require such officers to be stockholders, in no way contradicts the testimony of Thoits. In the absence of other evidence, it might perhaps be presumed that a director in such a corporation is a stockholder, but positive and direct evidence that he is not would completely overcome and rebut such presumption. Though directors Hazen and Congdon seem to have had very little, if anything, to do with the conduct of the corporate affairs, and they may have disposed of their holdings subsequent to their election as such. If the testimony of Thoits on this subject was not true, defendant could very easily have shown it on the trial, but no effort was made to do so.

There is nothing in the record of a substantial nature to contradict the testimony of Thoits that he paid the Mergenthaler note at about the date of the loan from plaintiff, and although counsel ²⁸⁶ for defendant urge with much earnestness that the testimony of Thoits on this subject is false, the record before us will not warrant concurrence in their contention. Neither is there any question but that the evidence shows that Thoits actually received the money from plaintiff, and deposited it in defendant's bank account, and used it in its business affairs. The contention of counsel that the loan from plaintiff was for the personal and individual use and benefit of Thoits is not sustained by the record. It is not disputed but that Thoits kept two bank accounts, one in the name of the company and one in his personal name. Nor can it be denied but that the money so borrowed was in fact deposited in the company's account, and that the corporation received the benefit of it. The evidence fairly and reasonably considered, fully supports and establishes all these facts, and there is no evidence to sustain a contrary conclusion, nor sufficient to require a submission of the case to a jury. In view of which, and of the nature of

Thoits' agency, the extent of his power and authority, together with the fact that he was the only stockholder in defendant at the time, we think it very clear that he had implied authority to make the note and borrow money thereon for the use and benefit of the corporation; and the money having been in fact obtained and applied to the uses of defendant with the assent of the only stockholder, defendant cannot now be heard to question the validity of the transaction.

Authority on the part of an officer of a corporation to borrow money to pay its debts and to make and deliver the promissory note of the corporation for that purpose was sustained in *Rosemond v. Northwestern Autographic Ry. Co.*, 62 Minn. 374, 64 N. W. 925, a very similar case to the one under consideration. And it was held in *Kraniger v. People's etc. Soc.*, 60 Minn. 94, 61 N. W. 904, that an unauthorized act of an officer of a corporation may be ratified and confirmed by the subsequent assent of all the stockholders. If all the stockholders of a corporation may so ratify an unauthorized act of one of its officers, it would seem reasonably clear, on principle, to be within their power to authorize the act in the first instance and without formal or other action on the part ²⁸⁷ of the board of directors. It was so held in *Martin v. Niagara Falls Mfg. Co.*, 44 Hun, 130.

Counsel for appellant rely upon *Porter v. Winona etc. Grain Co.*, 78 Minn. 210, 80 N. W. 965, to sustain their contention that the note is void on its face, but the case is not in point. It there appeared that the note was made and negotiated by the officer of the corporation for his personal use and benefit, while in the case at bar it appears to have been made exclusively for the benefit of the corporation. Not having been made for the personal use of the officer, but for the exclusive benefit of the corporation, the note is valid, and the prima facie rule of invalidity laid down in the *Porter* case is overcome: *Tuska-loosa etc. Oil Co. v. Perry*, 85 Ala. 158, 4 South. 635.

Several rulings of the trial court are challenged by proper assignments of error, but a careful consideration of the rulings complained of discloses no prejudicial error. It was no doubt immaterial that Thoits had made two other notes in the name of the corporation similar to this one, but the admission of that evidence in no way prejudiced defendant, and is no ground

for a new trial. Though some of the other objections to evidence may perhaps have been well taken, no error to justify a reversal is shown. The controlling facts in the case, as they appear from a careful reading and examination of the whole record, would not be substantially changed or affected if some of the answers to questions objected to, which are urged as conclusions rather than statements of fact, were wholly stricken out. No prejudicial error, therefore, appears upon this branch of the case, and as no other reversible error is found in the record, the order appealed from must be affirmed.

CORPORATIONS.—THE PRESIDENT of a corporation, who owns a greater part of its stock, who has been permitted to manage its business, as if it were his own private affair, and who by its by-laws is granted control over the board of directors, must be deemed to have authority to act for the corporation, and to make any contract it has authority to enter into: *Jones v. Williams*, 139 Mo. 1, 61 Am. St. Rep. 436, 39 S. W. 486, 40 S. W. 353. A note in the name of a corporation, executed by the president for material used in the corporate business, binds the corporation: *Mott v. Hicks*, 1 Cow. 513, 13 Am. Dec. 550. But see *City etc. Ry. Co. v. First Nat. Ex. Bank*, 62 Ark. 33, 54 Am. St. Rep. 282, 34 S. W. 89.

McDONALD v. ST. PAUL.

[82 Minn. 308, 84 N. W. 1022.]

MUNICIPAL CORPORATIONS—USE OF STREETS AND BOULEVARDS.—The primary purpose of a street is to accommodate public travel. But whenever any portion of a street not used for business purposes can be set apart for park or boulevard purposes without any impairment of such primary purpose, the municipality may set apart such portion for boulevards or other similar purposes.

MUNICIPAL CORPORATIONS—USE OF STREETS AND BOULEVARDS—CARE REQUIRED.—If a city sets apart and improves a portion of a street for a boulevard, it is not bound to use due care to keep such portion free from all obvious obstructions necessarily incident to its use as a boulevard.

MUNICIPAL CORPORATIONS — BOULEVARDS — OBSTRUCTIONS—NEGLIGENCE.—A city has no right to maintain, nor to permit others to maintain, on its boulevards, and especially on those at street corners, anything in the nature of a dangerous pitfall, trap, snare, or like obstruction, such as a stretched wire, whereby a traveler may be injured. Its negligence in so doing, when the facts present a fair question upon which reasonable men might differ, is for the jury to determine.

J. E. Markham and T. W. Root, for the appellant.

D. W. Doty and T. J. Wheeler, for the respondent.

313 **START, C. J.** The plaintiff, on the evening of December 2, 1899, while attempting to cross the street diagonally at the southwest corner of Marshall and Dewey avenues, in the city of St. Paul, was thrown to the ground by a wire stretched along the boulevard at the street corner, whereby she was injured. She brought this action to recover damages for personal injuries so sustained, on the ground that the city was negligent in permitting the wire to be in the street. Verdict for the plaintiff for two hundred and fifty dollars. The defendant moved for judgment in its favor notwithstanding the verdict, which was denied, and it appealed from the judgment entered upon the verdict.

The undisputed facts in this case, briefly stated, are these: Marshall avenue runs east and west, and is one hundred feet wide, and is crossed at right angles by Dewey avenue, sixty-six feet wide. The central fifty-two feet of Marshall avenue are graded and prepared for a roadway. Through the center of this roadway two street-car tracks are maintained and used for passenger traffic. On either side of this roadway are boulevards eighteen feet wide, and outside them are plank sidewalks six feet wide. On the dividing lines between the roadway and the boulevards are stone curbs. The boulevards are graded on a level with the sidewalks and the top of the curb. Grass and shade trees are growing on the boulevards. On Dewey avenue the boulevards are eleven feet wide. There is a walk across Marshall avenue on the west line of Dewey avenue, and the sidewalk on the south side of Marshall west of Dewey continues across the boulevard and into the roadway of Dewey avenue. At the intersection of Marshall and Dewey, and between the crosswalks and the curb, at the southwest corner, is an oblong portion of boulevard eleven by eighteen feet.

On November 18th—two weeks before the accident—the owner of the adjoining property set out a tree near the center of the oblong tract. To support the tree a small wire was wound **314** around the tree about four or four and one-half feet from the ground, and fastened one end thereof to a stake driven into the ground at a point twenty-two inches north of

the crosswalk leading to Dewey avenue, and three feet and two inches inside the curb, and the other end thereof to a stake driven into the ground at a point about seven feet three inches north from the tree, and about five feet and five inches from the crosswalk leading across Marshall avenue. The tops of the stakes were driven nearly level with the surface of the ground. The stakes and wire could readily be seen by daylight, but not at night.

The plaintiff, on the evening in question, and after dark, was walking rapidly (as she was afraid she would miss a car) on the sidewalk on the south side of Marshall avenue for the purpose of taking the car which was to stop on the east side of Dewey avenue. When she reached the corner she attempted to "cut across"—that is, to cross diagonally—the oblong portion of the boulevard we have described, and in so doing she was caught by the wire, and thrown down and injured. While she could not see the wire, she observed the tree, and the surface of the ground, which appeared to be free from obstructions. The evidence as to the locus in quo indicates that pedestrians who were in a hurry, and knowing nothing about the wire, would be quite apt to "cut across the corner." The side and cross walks were in a condition of safety, and the plaintiff would not have been injured if she had kept thereon. The place of the accident was in the residence district of the city, but it was about five miles from the center of the city, and was somewhat sparsely populated. A mounted policeman, however, patrolled the district for twenty-two hours each day, passing the corner in question frequently. It was his duty to report to his chief any defects in the streets or sidewalks discovered by him.

The defendant requested the trial court to direct a verdict in its favor on the ground that, as a matter of law, upon the undisputed evidence, the defendant was not guilty of any negligence in the premises, but the plaintiff was guilty of negligence which was the proximate cause of the accident. This was refused by the court, and the ruling is here assigned as error.

315 The main question to be here considered is whether, upon the special facts of this case, the alleged negligence of the defendant was a question of law or fact. The contention of the defendant is that when, as in this case, a municipality sets apart, marks out by curbing or otherwise, and improves a per-

tion of a street as a boulevard, it is notice to the public that such part of the street is not intended for travel, and that any person who, without any necessity, and solely for his own convenience, uses it instead of the sidewalk, assumes all risk of injuries from obstructions thereon; or, in other words, that the city, when it has so withdrawn and improved a part of the street, is not bound to maintain it in a condition of safety for pedestrians who leave the safe sidewalk and go upon the boulevard. The plaintiff, on the other hand, claims, as we understand her counsel, that when a city improves a street to its full width pedestrians have a right to travel on any part of the street, including the boulevard, without any necessity for so doing, and that the city is bound to exercise due care to keep all parts of the street relatively safe for public travel.

The right of a municipality to determine within reasonable limits what part of a street in a residence district shall be set apart for the roadway for travel of all kinds, what part for sidewalks for exclusive use of pedestrians, and what part for boulevards with grass, trees, and flowers planted thereon, is now undoubted. There are adjudged cases, decided in the early history of municipalities, when the stern taste and asceticism of the times could see no other use for a public street than a means of getting from one place to another, which are not in harmony with the rule we have stated. But in this state streets are laid out or dedicated for many purposes other than the accommodation of public travel in the ordinary way. They are intended for the purpose of furnishing light and air, and in the residence districts for boulevarding portions of them, thereby adding to the beauty of the city, and contributing to the health and happiness of its citizens. Of course, the primary purpose of a street is to accommodate public travel, but whenever any portion of a street not used for business purposes can be set apart for park or boulevard ³¹⁶ purposes without any substantial impairment of such primary purpose, the municipality may set apart such portion for boulevards and other similar public purposes.

Having such right, and the marking out and improving of the boulevard being notice to pedestrians that it is not intended for the purposes of travel, it logically follows that the municipality is not bound to use due care to keep such portion of the street free from all obvious obstructions which are necessarily incident to its use as a boulevard, although they may endanger the safety

of travelers thereon, even conceding, without so deciding, that a pedestrian, in the absence of a law or ordinance prohibiting it, has the technical legal right to travel wherever he pleases in the street. While this is true, yet the municipality has no right to maintain or permit others to do so, on its boulevards, and especially on those at the street corners, anything in the nature of a dangerous pitfall or trap, or snare, or like obstruction, whereby the traveler, yielding to the impulse of the average person to cut across the corner when in a hurry, may be injured. The trial court in substance so instructed the jury. Now, can it be held, as a matter of law, that the facts in this case do not bring it within this rule? This, in the last analysis of the evidence, is the pivotal question, and we answer it in the negative.

It will serve no practical purpose to repeat or discuss the facts, for we are of the opinion that they present a fair question upon which reasonable men might, and probably would, draw different conclusions. If the accident had occurred on the boulevard between the block lines, instead of the one at the street corner, the case would not be so clearly one for the jury. The question of the defendant's negligence and that of the plaintiff, including the assumption of the risk, was rightly left by the court to the jury.

Judgment affirmed.

COLLINS, J. If this accident had occurred anywhere upon the boulevard except at the corner, I am of the opinion that, on the authorities, there could have been no recovery. But in view of the fact as to the place where plaintiff was tripped, I think the case was for the jury.

MUNICIPAL CORPORATIONS.—A BOULEVARD which furnishes to the public all the conveniences of an ordinary street, and is equally inviting to the public, although an unusual space on either side is devoted to lawn, is a street or highway within a statute fixing the liability of municipalities for injuries upon highways and streets from defective sidewalks: *Burridge v. Detroit*, 117 Mich. 557, 72 Am. St. Rep. 582, 76 N. W. 84. Other cases bearing on this question are *Monongahela v. Fischer*, 111 Pa. St. 9, 56 Am. Rep. 241, 2 Atl. 87; *McArthur v. Saginaw*, 58 Mich. 357, 55 Am. Rep. 687, 25 N. W. 313.

MASON v. ST. PAUL FIRE AND MARINE INSURANCE COMPANY.

[82 Minn. 336, 85 N. W. 13.]

INSURANCE--FIRE -- PROOF OF LOSS -- FORFEITURE FOR FAILURE OF.—If an insurance policy provides that proof of loss shall be furnished within a specified time after loss, but does not provide that failure to do so shall work a forfeiture of the policy, nor make the furnishing of such proof of loss a condition precedent to the liability of the insurer, the time within which such proof is required to be furnished is not of the essence of the contract, and the failure to furnish such proof within such time does not invalidate nor work a forfeiture of the policy, but only postpones the time of payment.

PARTIES--DEFECT IN--OBJECTION--WAIVER.—A defect in parties appearing on the face of the complaint must be objected to by demurrer, or it is waived.

Palmer & Beek, for the appellant.

Lane & Nantz and T. Kneeland, for the respondent.

337 BROWN, J. This action is one to recover upon a fire insurance policy, issued by defendant to plaintiff and one Mabey, covering a steam yacht on the waters of Lake Minnetonka. Plaintiff had a verdict in the court below, and defendant appeals from an order denying a new trial.

The facts, briefly stated, are as follows: Plaintiff and Mabey jointly owned the yacht in question, and insured it in defendant company for the sum of one thousand dollars, the policy of insurance being in the form of the Minnesota Standard Policy, and dated and issued July 14, 1899. On August 22d following the yacht was totally destroyed by fire, as alleged in the complaint. Proofs of loss were served upon defendant on October 10, 1899. Defendant refused to settle the loss, and this action followed.

There are several assignments of error, but the main question for consideration is as to the effect of the failure on the part of the insured to make and serve on the company proofs of loss within the time prescribed by the terms of the policy, viz., forthwith, or, as we have heretofore held, within a reasonable time after the loss. The trial court charged the jury that plaintiff had failed to show a compliance with such provision, but that it was not material; that the failure did not invalidate the pol-

icy, nor prevent a recovery for an actual loss thereunder—the theory of the court evidently being that as the policy contains no terms of forfeiture, and being silent as to the effect of a failure in that respect, a provision rendering the policy unenforceable, and the rights of the insured forfeited, could not be read into it by judicial construction. We have given the matter very careful consideration, and reach the conclusion that the learned trial judge correctly disposed of the case. His charge to the jury was in line with the general trend of the authorities on the subject, and in ³³⁸ full accord with the general principles of law on the subject of forfeitures. The question was not necessarily involved or considered in *Rines v. German Ins. Co.*, 78 Minn. 46, 80 N. W. 839, nor in *Fletcher v. German-American Ins. Co.*, 79 Minn. 337, 82 N. W. 647, and is now before the court for the first time.

On the subject of proofs of loss, the policy provides as follows: "In case of any loss or damage under this policy, a statement in writing, signed and sworn to by the insured, shall be forthwith rendered to the company, setting forth the value of the property insured," etc.

It further provides for the payment of any such loss within sixty days after proofs of loss are served. It contains several provisions, a violation or failure of compliance with which on the part of the insured renders it wholly void, but contains no provision or stipulation giving any such effect to a failure to serve proper proofs of loss within the time therein provided. Nor is there any general clause in the policy to that effect. The submission to arbitration as to the amount of loss, where the parties do not agree upon that question, is made a condition precedent to the right of action on the policy. The policy also provides that an action thereon must be brought within two years from the date of the loss, but contains no provision making the service of proofs of loss within the time specified fatal to the rights of the insured, or a condition precedent to the liability of the company.

It is very generally held by the authorities in cases where this question has been presented that unless the policy provides a forfeiture, or makes the service of proofs of loss within the time specified therein a condition precedent to the liability of the company, the time within which such proofs are required to be

furnished is not of the essence of the contract. Where no forfeiture is provided by the terms of the contract, and the service of proofs of loss within the specified time is not made a condition precedent to the liability of the company, the effect of such failure is simply to postpone the day of payment. No liability attaches to the company, however, until such proofs are furnished; but unless otherwise provided, expressly or by fair implication it is ³³⁹ not important that the proofs be not in fact served within the time stated in the policy: 2 May on Insurance, 4th ed., 1097, note "a"; Coventry etc. Assn. v. Evans, 102 Pa. St. 281; Carpenter v. German-American Ins. Co., 52 Hun, 249; 4 N. Y. Supp. 925; Vangindertaelen v. Phenix Ins. Co., 82 Wis. 112, 33 Am. St. Rep. 29, 51 N. W. 1122; Rynalski v. Insurance Co., 96 Mich. 395, 55 N. W. 981; Northern Assur. Co. v. Hanna, 60 Neb. 29, 82 N. W. 97; Steele v. German Ins. Co., 93 Mich. 81, 53 N. W. 514; Kenton Ins. Co. v. Downs, 90 Ky. 236, 13 S. W. 882; Sun Ins. Co. v. Mattingly, 77 Tex. 162, 13 S. W. 1016; Kahnweiler v. Phoenix Ins. Co., 57 Fed. 562; Southern Ins. Co. v. Knight, 111 Ga. 622, 78 Am. St. Rep. 216, 36 S. E. 821.

It was held by this court in Bowlin v. Hekla F. Ins. Co., 36 Minn. 433, 31 N. W. 859, Shapiro v. Western Home Ins. Co., 51 Minn. 239, 53 N. W. 463, Shapiro v. St. Paul etc. Ins. Co., 61 Minn. 135, 63 N. W. 614, and Ermentrout v. Girard F. & M. Ins. Co., 63 Minn. 305, 56 Am. St. Rep. 485, 65 N. W. 635, that a failure of strict compliance with similar provisions in the policies there under consideration was a condition precedent to the company's liability, but such policies contained express provisions to that effect, and the decisions there made were based upon that fact. The cases are inapplicable, and not in point. Though the policy here under consideration is identical with those in Rines v. German Ins. Co., 78 Minn. 46, 80 N. W. 839, and Fletcher v. German-American Ins. Co., 79 Minn. 337, 82 N. W. 647, the precise question now before the court was not there presented. It was suggested in respondent's brief in the latter case, but was not argued by appellant. It was there assumed that compliance with the policy was essential to charge the company with liability, and the only questions decided with respect to this immediate subject were that "forthwith" should be construed to mean within a reasonable time, and that what would constitute a reasonable time was a question of fact to be determined from the evidence and circumstances of each case.

There is much force in the contention of counsel for appellant

that the insured should be held to a strict compliance with this provision of the policy. There is every reason why prompt notice should be given the insurance company. Some of them are suggested in *Fletcher v. German-American Ins. Co.*, 79 Minn. 337, 82 N. W. 647. Immediate notice, or notice within a reasonable time, will afford the ³⁴⁰ company an opportunity to make investigation into the cause of the fire, which may be essential and necessary to the protection of its interests, and to which it is justly entitled. It will afford the company an opportunity to detect fraud, if any be connected with the loss, to ascertain the nature and extent of the loss, and make such other investigation as would be fruitless after long delay. But the policy before us contains no provisions which will justify a holding that a strict compliance therewith in this respect is essential, and the matter must be referred to the legislature to consider and adjust by proper amendment to the standard policy law, if such amendment shall be deemed just and equitable.

Appellant contends, further, that there is a defect of parties plaintiff, and that for this reason a verdict should have been directed for defendant. The contention that there is a defect of parties plaintiff is undoubtedly sound, but defendant waived the objection. The complaint alleges that plaintiff owns an undivided two-thirds of the yacht, and that Mabey owns an undivided one-third. It therefore appears upon the face of the complaint that plaintiff and Mabey were joint owners of the insured property, that the objection that there was a defect of parties should have been taken by demurrer, and, not having been so raised, was waived: *Davis v. Chouteau*, 32 Minn. 548, 21 N. W. 748; *Miller v. Darling*, 22 Minn. 303.

A careful examination of the record does not satisfy us that defendant was prejudiced by the remarks of plaintiff's counsel in his address to the jury, and the assignments of error covering exceptions to such remarks present no reversible error.

Order affirmed.

INSURANCE—PROOF OF LOSS. —Under a policy which provides that proofs of loss shall be furnished within sixty days, but the furnishing of proofs within that time is not made a condition precedent to recovery, the failure so to do will operate simply to postpone the right of the insured to bring suit until he has furnished the proofs required by the policy: *Southern Fire Ins. Co. v. Knight*, 111 Ga. 622, 78 Am. St. Rep. 216, 36 S. E. 821.

SCHMIDT v. CONSTANS.

[82 Minn. 347, 85 N. W. 173.]

COTENANCY—LANDLORD AND TENANT.—If one cotenant leases his share of the common property to another, the parties to the lease bear to each other the relation of landlord and tenant, subject to its obligations and rights.

COTENANCY—LANDLORD AND TENANT—COST OF REPAIRS.—If the relation of landlord and tenant exists between cotenants, the one in possession of the whole premises cannot, in an action for partition, charge his landlord for repairs made upon the property, in the absence of a special agreement that he shall be compensated therefor.

Warner & Lawrence, for the appellants.

Clapp & Macartney, for the respondent.

349 COLLINS, J. For some years prior to September 1, 1889, the plaintiff and defendant were, and ever since have been, equal tenants in common of certain real property, used for brewery purposes. On the day mentioned, through the assignment of a lease held by a third party, plaintiff became the tenant of the defendant as to the latter's ³⁵⁰ undivided half of the property, and ever since that time he has carried on the business of brewing upon the premises. The lease in question expired in 1893, but the plaintiff since that time has been a tenant at will, paying a stipulated monthly rental for defendant's moiety. In 1898 he requested that defendant agree to the making of certain repairs, improvements, and alterations on the premises, which would render them more suitable for the brewery business. This defendant refused to do unless the plaintiff would pay an increased rental. Plaintiff declined to do this, and thereupon he made the repairs, improvements, and alterations himself, paying out quite a sum of money therefor. Later, in 1898, the plaintiff refused to pay the agreed rent, and after several months' default, defendant brought an action to recover the same. As a defense and counterclaim this plaintiff alleged in that action that the repairs, improvements, and alterations before mentioned were made under an agreement that the defendant should pay for one-half thereof, and this amount he counterclaimed in his answer as against the demand for rent. The court below found against him upon the counterclaim, and ordered judgment for the full amount of the rent.

The plaintiff then brought an action in partition, setting up the making of repairs and improvements upon the premises, of a certain value, all of which were necessary, and needful for the preservation and enjoyment of the property, largely enhanced its value, and were made in good faith. Both parties admit that the property cannot be divided, but must be sold, and the dispute is as to the disposition of plaintiff's claim that defendant is liable on account of certain of the repairs, the court below finding that such repairs had enhanced the value of the property in an amount stated, were necessary and needful, were made in good faith, and that plaintiff was liable in an amount equal to one-half thereof.

It stands undisputed that when plaintiff demanded of defendant that he join in making the repairs in question, when they were made, and when this action was instituted, the relation of landlord and tenant existed between these parties as to an undivided half of the premises. Defendant was the landlord, and plaintiff was his tenant. The latter had voluntarily become a tenant ³⁵¹ through an assignment of a lease. The plaintiff remained in exclusive possession of the whole property after the term fixed by the lease had expired. He remained as a tenant by express agreement, paying a monthly rental without objection, until he undertook to withhold payments upon the ground that defendant had agreed to pay one-half of the cost of the repairs, improvements, and alterations already made.

We shall assume, for the purposes of this case, that when a tenant in common has made necessary and needful repairs upon the common property, he can, in equity, compel contribution from his cotenants: See 11 Am. & Eng. Ency. of Law, 1104. In the case of *O'Connor v. Delaney*, 53 Minn. 247, 39 Am. St. Rep. 601, 54 N. W. 1108, it was held that, when the relation of landlord and tenant is created between tenants in common, the tenant co-owner, if he remains in exclusive possession after the term for which his cotenant's share was leased to him, must be held to do so in the character of tenant, and that the same rules will apply as in a case of any other tenant holding over. No express agreement to pay rent—and there was such an agreement in this instance—is necessary, under the rule in that case, to continue the character of the tenant. He remains an occupant of his cotenant's moiety under the terms of the lease, not as a cotenant.

The important inquiry here is as to the relation which existed between the parties, it being the contention of defendant that

they were those of landlord and tenant, both parties being subject to the obligations and entitled to the rights of landlord and tenant, and none other. There was no covenant or agreement in the lease to repair on the part of the landlord, and in the absence of such covenant or agreement, and where there is no fraud, misrepresentation, or concealment by the lessor, there is no implied warranty on his part that the leased premises are fit for the purposes for which they are rented, or covenant to put them in repair or to keep them so. There was no claim of fraud, mistake, or misrepresentation in this case. If the plaintiff was a tenant solely, he could either keep the premises in repair on his own account, or go without such repairs. If he was simply and exclusively a tenant under a lease, in no manner could he compel his ³⁵² landlord, as such, to pay for such repairs, nor did he undertake to do so. His claim was that he could compel such payment because the parties continued to be tenants in common, and the court below so held.

It is unquestionably the general rule of law that cotenants are at liberty to contract with one another in relation to all matters, including the subject matter of the tenancy. One may lease his moiety to the other, and upon such leasing the parties bear to each other the relations, are subject to the obligations, and entitled to the rights, of landlord and tenant. The cotenant leasing has the right to distrain for rent due on the lease. Joint tenants may make a subdivision of time of their respective occupancy of the property held in joint tenancy, and if an injury is committed upon the joint right while it is held in the exclusive possession of one of the joint tenants under the subdivision, trespass may be sustained by the exclusive possessor for the time being: Freeman on Cotenancy and Partnership, 2d ed., sec. 164. The precise point in the present controversy is not covered by any of the cases cited by Mr. Freeman in support of the text, and counsel have found none, so far as shown by their briefs.

On the part of the plaintiff we are referred to Cosgriff v. Foss, 152 N. Y. 104, 57 Am. St. Rep. 500, 46 N. E. 307, while attention is called to Harry v. Harry, 127 Ind. 91, 26 N. E. 562, by defendant's counsel. But neither can be regarded as authority on this point. It appeared in the Cosgriff case that improvements were made on the common property by one cotenant in possession while he was a tenant of the others under a lease, and in an action of partition an attempt was made to secure contribution. The prominent question discussed in the

opinion is the equitable right of one cotenant making improvements to compel other cotenants to share the expense thereof. The conclusion was that the claim lacked sufficient "equitable strength" to justify its allowance, one of the reasons given being that the maker of the improvements sustained the double relation to his cotenants of tenant by lease and tenant in common. The exact question herein presented was involved in the facts of that case, and might have been decided, but was not. We may as safely infer that it was overlooked by both court and **353** counsel as to infer that it was concluded that there was no merit in the claim that while property owners, situated as were these parties, may occupy a double relationship, their rights, duties, and obligations are not double. *Harry v. Harry*, 127 Ind. 91, 26 N. E. 562, is simply in line with our own case of *O'Connor v. Delaney*, 53 Minn. 247, 39 Am. St. Rep. 601, 54 N. W. 1108, and lays down the same general proposition as to the rights and obligations of a tenant in common who remains in possession of the common property after the expiration of the time fixed in the lease to him from his cotenant. What was said in the opinion as to the right of the tenant in possession to compensation for improvements made upon the premises, and that he is governed by the rule which exists between landlord and tenant, was obiter.

Except as the present case is governed by the general rule quoted from *Freeman*, it is one of first impression, but, we think, easy to dispose of upon principle. The plaintiff here was not occupying the premises as a cotenant in so far as his duties and obligations to and with the defendant were concerned. He was in possession of defendant's share of the estate as a tenant, and under a lease which he had voluntarily entered into. To allow him to have all of the beneficial provisions of the lease, and reject and escape from its obligations or liabilities, would be rank injustice. To hold his cotenant to the obligations arising out of an express contract of leasing, and at the same time to compel him to respond in all matters growing out of the relation of tenancy in common, would also be unjust. The tenant cannot be permitted, for one purpose, and when to his advantage, to say that his relations are those of a cotenant, and then, for another purpose, and also for his own advantage, to plead that he is simply a tenant under a lease. He cannot occupy the relation of tenant under the lease or that of tenant in common at his own will. To permit him so to do would lead, as it did in this case, to a most inequitable result; for the plaintiff's

claim, with interest from the time he expended his money, was made a first lien upon the proceeds of the sale in partition, the whole amount to be paid to plaintiff, while the defendant was, in effect, held to be nothing but a landlord, and as to rent for his moiety, during the period of time for which he was obliged to pay interest, bound by the terms of a lease entered into ³⁵⁴ long prior to the making thereof. In other words, the parties were cotenants as to repairs, and landlord and tenant as to the rent to be paid for the use of defendant's share of those repairs. No court should permit a tenant in common, who has become the landlord of his cotenant, in accordance with the terms of an ordinary lease, "to be improved out of his estate" in this manner.

We hold the rule to be (assuming, as before stated, that when one tenant in common has made necessary and needful repairs upon the common property he can, in equity, compel contribution from his cotenant) that, when the relation of landlord and tenant exists between such cotenants, the one in possession of the whole cannot, in an action for partition, charge his landlord for repairs made upon the property, in the absence of a special agreement that he shall be compensated therefor.

Order reversed.

COTENANTS.—THE RELATION OF LANDLORD and tenant between co-owners and their rights as to improvements on the partition of the property are discussed in *Carson v. Broady*, 56 Neb. 648, 71 Am. St. Rep. 691, 77 N. W. 80; *Cosgriff v. Foss*, 152 N. Y. 104, 57 Am. St. Rep. 500, 46 N. E. 307; monographic note to *Ward v. Ward*, 52 Am. St. Rep. 928.

GORSTZ v. PINSKE.

[82 Minn. 456, 85 N. W. 215.]

TRIAL—INSTRUCTIONS.—If erroneous instructions, clearly applying to the facts in the case, are given to the jury, such error is not cured by subsequent correct instructions not directly pointing out and correcting the erroneous instructions.

TRIAL—ABSTRACT INSTRUCTIONS.—Instructions given by the court to the jury must apply the law to the essential facts in a practical and concrete form. Error in this respect is not cured by a general, correct abstract instruction upon the same subject.

TRIAL—CONCRETE AND ABSTRACT INSTRUCTIONS—PRESUMPTION.—Correct statements of abstract propositions by a court contained in instructions must be considered in view of

the whole charge, and, if coupled or connected with misleading or injurious instructions of a concrete nature, it must be presumed on appeal that the jury gave more weight to those portions of the charge directly affecting the question involved, as stated in such concrete form, than to the abstract modifications in other portions of the charge, although literally correct.

Calkins & Calkins, for the appellant.

O. Mosness and P. Sharpe, for the respondent.

456 LOVELY, J. Civil action brought against defendant to recover for an alleged assault upon the plaintiff. Defendant counterclaimed for an assault arising out of the same transaction. The plaintiff had a **457** verdict. Defendant moved for a new trial upon a settled case, for errors of law and upon other grounds, which motion was overruled, and defendant appeals to this court.

The respective parties to this action were neighbors. Defendant occupied and cultivated a tree claim adjacent to the public highway. A few days previous to the alleged assault upon plaintiff defendant had plowed the land between his tree claim and the highway, and seeded the same to grass, to secure the benefit of Laws 1895, chapter 59, section 1, which provides: "That any person living upon or owning land fronting on any of the public highways of this state may, for the purpose of seeding the same down to grass, plow and level the said highways for said purpose, and seed the same to grass to within one (1) rod of the center of the same," etc.

Evidence was offered at the trial tending to show that on the day previous to the alleged assault upon plaintiff the latter had passed over the highway, going out of the traveled portion, and drove upon the plowed soil seeded by defendant. Whether it was necessary for the plaintiff to leave the traveled highway and drive over the newly plowed ground was, upon the evidence, an open question for the jury. Testimony was also introduced on the part of the defendant to show that plaintiff, on the day when the assault was committed, and immediately previous to the same, again passed over this highway with a team and wagon, again driving outside of the traveled way, very close to the trees upon defendant's tree claim, and that his actions in this respect had a tendency to cut up the soil and injure the growth of the newly planted seed, all of which was denied, and made an issue of fact by the plaintiff, upon which testimony was received on both sides. There was also evidence tending to show that at the time of the assault plaintiff carried a gun, and

claimed the right to travel anywhere within the four rods of the legal highway, without reference to the use to which defendant had adapted it for improvement under the statute referred to. It is unnecessary to detail the disputed evidence of the assault, further than to say that, upon the claim of defendant, the controversy between the parties commenced in an attempt by him to prevent plaintiff from destroying ⁴⁵⁸ the effects of his work in seeding the land between the tree claim and the highway.

Very much of the testimony at the trial was devoted to the question of provocation for the assault as above indicated. In the charge of the learned trial court, the jury were instructed in these words: "The jury are at liberty to take into consideration the injuries, so far as they have been shown by the evidence; the pain and suffering endured by the injured party; his loss of time, if loss of time has been proven, and award such damages as the jury may think proper and right in view of all the circumstances proven on the trial of this case. . . . If you find that the injuries were inflicted willfully and maliciously, then the jury . . . are not limited to mere compensation for the actual damages sustained, but they may give such further sum by way of exemplary damages, as an example to others, to deter them from offending in a like manner."

No exception was taken to this portion of the charge, and it undoubtedly correctly states the law as it exists in this state. The court further instructed the jury: "That any person may seed the highway opposite his land or in front of his land—however, not within one rod of the center of the highway—and the defendant had the right to seed the highway opposite his land in that way," and then used the following language: "But if the plaintiff had a mind to drive over that part that was seeded, he had the legal right to do so." To this instruction exception was duly noted. The court further instructed the jury, in connection with and following the portion of the charge last referred to, that: "The fact that he did so [drive over the seeded portion of the highway] would not be a justification for an assault and battery. Still, it may be considered by the jury in mitigation of damages."

The only question we deem it necessary to consider on this appeal is as to the legal effect to be given to the portion of the charge excepted to. There is no doubt as to the abstract correctness of the statement of law that the provocation given by plaintiff in driving over the seeded portion of the highway did not justify an assault upon him by the defendant; but in view

of the ⁴⁵⁹ course of the trial, in which the right of the plaintiff to use the four rods of the highway, and to drive where he "had a mind to" upon it, was involved, we think that the court gave undue prominence to the assertions of such right by the plaintiff, under the proofs, and erroneously instructed the jury prejudicially to defendant in that respect. Under the evidence, upon this instruction, the jury might have found that plaintiff had an absolute right to drive at his will and pleasure on the seeded land; and the assertion of that right might well have been considered as an aggravation of the assault, justifying the award of smart money. An essential element of punitive damages, as stated by the court, consists in malice, which requires a consideration by the jury, when such damages are allowable, of aggravating or mitigating circumstances; and it seems to us that the concrete statement by the court that plaintiff had a right to drive over the highway where "he had a mind to" was calculated to mislead, and might have justified the view by the jury that the defendant had no right whatever to avail himself of the benefit of the statute giving him the right to seed the untraveled part of the four rods of the legally laid out right of way.

The abstract statement that the right of the defendant to seed the same might be considered in mitigation of damages, following the excepted portion of the charge, does not, in our judgment, cure the erroneous impression that might naturally be received by the jury by the improper instruction referred to, and deprive the defendant of his right to have the alleviating features which led to the assault considered in an intelligent and sensible manner. The statements of the court in this respect are contradictory, and could not but have been confusing, and may have seriously enhanced the damages, which were large, considering the evidence of the real injuries inflicted upon the plaintiff. Correct statements of abstract propositions by a court must be considered in view of the whole charge, and if coupled or connected with misleading or injurious instructions of a concrete nature, it must be presumed upon review in this court that the jury gave more weight to those portions of the charge which directly affected the question involved, as stated in such concrete form, than the ⁴⁶⁰ abstract modifications in other portions of the charge, although literally correct: *Harrist v. Holmes*, 77 Minn. 245, 79 N. W. 1003. And we must hold such to be the effect of the charge in this case: *Goodhue*

Farmers' Warehouse Co. v. Davis, 81 Minn. 210, 83 N. W. 531.

We find no other errors worthy of serious consideration, but for the misdirection of the court above noted the order appealed from must be reversed, and a new trial ordered.

INSTRUCTIONS should be considered as a whole: **Fearey v. O'Neill**, 149 Mo. 467, 73 Am. St. Rep. 440, 50 S. W. 918. Abstract instructions should not be given: **Notes to State v. Whit**, 72 Am. Dec. 540; **O'Rourke v. Citizens' St. Ry. Co.**, 76 Am. St. Rep. 649. Bad instructions are generally not cured by good ones: **Henry v. State**, 51 Neb. 149, 66 Am. St. Rep. 450, 70 N. W. 924; **Snyder v. Wheeling Electrical Co.**, 43 W. Va. 661, 64 Am. St. Rep. 922, 28 S. E. 733. But see **Kansas City etc. R. R. Co. v. Becker**, 67 Ark. 1, 77 Am. St. Rep. 78, 53 S. W. 406.

WOODLAND COMPANY v. MENDENHALL

[82 Minn. 483, 85 N. W. 164.]

VENDOR'S LIEN ON PERSONALTY.—If one street railway company while operating the line of another purchases and strings a large quantity of wire along the line of the latter company necessary to its operation, and under agreement with it that it will repay the former company the purchase price thereof, the purchasing company, so long as it retains control and possession of the wire, is entitled to retain a lien thereon for the unpaid purchase price, although the railway line along which it is strung is transferred to a third person.

LIENS—TRANSFER OF DEBT.—The assignment of a debt carries with it all liens or other security for its payment.

VENDORS' LIENS FOR THE PURCHASE PRICE OF PERSONALTY are not lost nor waived by the acceptance of the note of the debtor, nor by subsequent action and judgment thereon, so long as the debt remains unpaid, and the lienor retains possession and control of the property against which the lien exists.

VENDOR'S LIEN AGAINST PERSONALTY—POSSESSION. Although retention of possession of personalty is necessary to the preservation of a lien thereon for the unpaid purchase price, continued, actual, physical possession is not necessary, because it is sufficient if the lien claimant retains such possession as will preserve in him the actual control of the property.

Jacques & Hudson and J. G. Williams, for the appellant.

H. B. Fryberger, for the respondent.

487 BROWN, J. This action is one in claim and delivery for a quantity of copper wire. It was brought to recover the possession of thirty-one thousand four hundred and twenty-three

feet of such wire, but only thirteen thousand and twenty-nine feet are in dispute. Defendants had judgment therefor in the court below, and plaintiff appeals from an order denying a new trial.

The cause was tried below without a jury, but the trial court made no specific findings of fact, and only found the ultimate fact that defendants were entitled to the possession of the wire. Nor was any request made for specific findings. So if the evidence upon any theory consistent with legal principles will sustain the ultimate fact so found, the order appealed from must be affirmed.

The principal facts in the case, as we gather them from the evidence and concessions in the briefs of counsel, are about as follows: In October, 1892, the Motor Line Improvement Company, a corporation, owned a partly equipped line of street railway in the city of Duluth, extending from East Twenty-seventh street, in said city, to Woodland Park. At that time said company entered into a contract or agreement with the Duluth Street Railway Company, by which the latter company undertook, under certain terms and conditions specified and set forth in the writing, to operate the motor company's line in connection with its own line. It was under no duty or obligation, under the contract, to equip the motor company's line. Such line was fully equipped for all ordinary traffic at the time the agreement was entered into, and the street railway company agreed to keep and maintain it in that condition.

⁴⁸⁸ It was subsequently learned that the equipment of the line provided by the motor company was inadequate, with respect to feed wire, to furnish power on certain public occasions when large bodies of the people made use of the line, and, to supply the necessary power, the wire in question was purchased by the street railway company, and strung on the poles of the motor line, under an agreement between the two companies to the effect that the street railway company should obtain a vendor's lien upon the wire, and hold possession thereof until paid for by the motor company. The Motor Line Improvement Company was unable, for want of funds, to purchase the wire, and under this agreement the street railway company purchased and paid therefor the sum of about three thousand five hundred dollars, which amount includes the expense of stringing the wire on the poles. At the time of making such contract Mendenhall was, and ever since has continued to be, the president of the street railway company, and was in 1898, in insol-

veney proceedings, appointed its receiver, and has ever since continued to act as such. The purchase price of the wire was charged to the motor company on the books of the street railway company, and the motor company subsequently gave its promissory note for the amount. The note and indebtedness were thereafter assigned and transferred to defendant Mendenhall, who still holds the same. The wire has never been out of the possession of the street railway company, or of Mendenhall, its receiver, since the day of its purchase. No part of the purchase price of the wire has ever been paid, and defendants claim a purchase money lien thereon.

Plaintiff asserts title and right to the possession of the wire through a trust deed executed by the motor company to secure the payment of two hundred thousand dollars, an indebtedness incurred by that company in the construction and equipment of its road. The deed was executed in 1892, long prior to the date of the transactions between the motor company and the street railway company, and purports to cover all the line of railway in question, including wires, poles, and such other fixtures and equipments as might thereafter be acquired as a part of the railway line. Default was made in the payment of the amount secured by the trust deed, ⁴⁸⁹ and it was duly foreclosed in 1898. Plaintiff became the purchaser at the sale of all the property covered by the trust deed and included in the foreclosure, and bases its right to the wire in question upon such foreclosure, and upon the further claim that subsequent to the foreclosure, and after the expiration of the period of redemption it brought an action against these defendants to determine adverse claims to such property, and obtained a judgment confirming its title. Such is the source and foundation of plaintiff's claim to the wire.

Plaintiff contends: 1. That the sale of the wire from the street railway company to the motor company was absolute, and delivery of possession was complete and unconditional at time of sale; 2. If a lien for the purchase price was in fact reserved, it was thereafter lost and waived by the dealings of the parties; and 3-4. That the foreclosure action and the action to determine adverse claims bar defendants' claim. The findings of the court below negative all these contentions, and the only question for us to determine is whether the findings are sustained by the evidence.

There is no question but that the street railway company purchased and paid for the wire under an agreement that the

motor company should repay the cost thereof, and no claim that the street railway company has ever been repaid or otherwise reimbursed by the motor company or by plaintiff. The removal of the wire from the poles in no way injured the line of railway, nor lessened, diminished, or impaired the security covered by the trust deed, or deprived the holder thereof of any right conferred thereby, and, as remarked by the learned trial judge, unless some decisive rule of law requires the wire to be taken from defendants, who hold it as security for the purchase price, and given to plaintiff, it should be left with those who paid value for it.

It is claimed by defendants that neither the title nor the right to the possession of the wire ever passed to the motor company; that the passing of such title was expressly conditioned upon payment being made therefor; and that the street railway company retained by agreement a lien thereon for the purchase price, and that such lien is still subsisting and of full force and effect. ⁴⁹⁰ The court below must have found the facts accordingly. They are embraced in the ultimate fact that defendants are entitled to the possession of the wire. A careful examination of the record satisfies us that the evidence justifies the conclusions reached by the trial court; at least, it is not so clearly against the findings as to warrant this court in setting them aside. It is not as clear and definite as might be desired, perhaps, but tends to support and sustain the claim of defendants, and we sustain the conclusions of the trial court.

The wire was purchased to be used in operating the motor company's line, not to equip it. The street railway company was under no obligation to furnish it under the operating contract. It was furnished under the separate contract and agreement made subsequently, was used exclusively in operating the line, and was at all times in the possession and under the control of the street railway company, or Mendenhall, its receiver. They retained all the possession the nature of the property and the uses to which it was put would permit. It was never given into the possession of the motor company, and such company never had other than such constructive possession as might arise by implication of law from the fact that it was upon its poles along its line of railway. But as such railway line, and all its fixtures and equipments, were, at the time in question, out of its possession and control, and in the possession of the defendants, such constructive possession can, in no

view of the law, have effect to divest the lien held by the street railway company. The wire not only never got into the possession of the motor company, but remained personal property, and never became a part of its line of railway. The court below was therefore fully justified in finding a possession of the wire in the street railway company or Mendenhall sufficient to support and sustain the lien for its purchase price: *Globe M. Co. v. Minneapolis Ele. Co.*, 44 Minn. 153, 46 N. W. 306; *Southwestern etc. Press Co. v. Stanard*, 44 Mo. 71, 79, 100 Am. Dec. 255; *Merchants' Nat. Bank v. Stanton*, 55 Minn. 211, 43 Am. St. Rep. 491, 56 N. W. 821; *Farnsworth v. Western Union Tel. Co.*, 6 N. Y. Supp. 735, 53 Hun, 636; *German Sav. etc. Soc. v. Weber*, 16 Wash. 95, 47 Pac. 224; *Prouty v. Barlow*, 74 Minn. 130, 76 N. W. 946; *Holly Mfg. Co. v. 491 New Chester Water Co.*, 48 Fed. 879; *Northwestern etc. Ins. Co. v. George*, 77 Minn. 319, 79 N. W. 1028, 1064.

In the case of *Merchants' Nat. Bank v. Stanton*, 55 Minn. 211, 43 Am. St. Rep. 491, 56 N. W. 821, it appeared that defendant therein had constructed a building upon land not owned by him, but which he was occupying with the permission of the owner, but with no agreement or understanding with such owner that the building should be considered personal property, and the court implied an agreement that it should remain the personal property of defendant, notwithstanding the fact that it was attached to the real estate and equipped as a factory, and that, too, as against a prior mortgage. If such an agreement was properly implied as a matter of law in that case, a similar implication would arise and should be applied in this case, to the extent necessary to preserve the defendants' lien: See, also, as pertinent to the subject, *Farmers' Loan etc. Co. v. Minneapolis etc. Works*, 35 Minn. 543, 29 N. W. 349; *Pioneer etc. Loan Co. v. Fuller*, 57 Minn. 60, 58 N. W. 831; *United States v. New Orleans R. R. Co.*, 12 Wall. 362; *Porter v. Pittsburgh etc. Steel Co.*, 122 U. S. 267, 7 Sup. Ct. Rep. 1206.

There was no separate assignment of the lien claim to Mendenhall; but it was not necessary that it be independently assigned. It is well settled that the assignment and transfer of a debt carries with it all liens or other securities for its payment: *Kinney v. Duluth Ore Co.*, 58 Minn. 455, 458, 49 Am. St. Rep. 528, 60 N. W. 23. Nor does the fact that the motor company gave its promissory note for the debt constitute a waiver of the lien: *Washington Slate Co. v. Burdick*, 60 Minn.

270, 62 N. W. 285; *Geib v. Reynolds*, 35 Minn. 331, 28 N. W. 923. Nor was it waived by the fact that the note was put into judgment: *Jones on Pledges*, sec. 591; 16 Am. Ency. of Pl. & Pr. 636. Notwithstanding the fact that a promissory note was taken for the debt, and the note subsequently put into judgment, so long as the debt remained unpaid and defendants held and retained possession of the wire, under the agreement that it should be held as security, the lien survived, and remained in full force and effect.

Retention of the possession of the property is unquestionably essential to the validity and life of a lien such as defendants rely ⁴⁹² upon in this case. And in this connection it is urged by plaintiff that the possession of the wire was not delivered to Mendenhall at the time the debt was assigned to him, and that in consequence the lien, if any existed, became lost and waived. It is not necessary, to give validity to such a lien, that the person entitled thereto retain at all times, and from all persons, the actual physical possession of the property. It is sufficient that he retains such possession as will preserve in him the actual control of the property. He may permit a third person to take and hold possession, but so long as he does not lose control of it, and the property does not reach the possession of the debtor, it remains impressed with the lien. Of course, if it comes lawfully into the possession of the debtor, the lien is lost. We have already noticed that Mendenhall was president of the street railway company, and subsequently its receiver, and as such operated both lines of railway. In such capacity he had the possession and control of both lines, and of all fixtures and equipments pertaining thereto. It was not necessary to constitute a transfer of the lien claim, under the circumstances shown in this case, that there be an actual physical transfer of the possession of the wire. If the parties had gone through the ceremony of a formal delivery, by words, the situation would have been in no manner changed. The wire would have remained on the poles, and Mendenhall would have continued in the operation of both lines of railway, as before, with the same possession. As before stated, we are satisfied that the trial court was warranted in finding a possession in Mendenhall sufficient to support and sustain the lien. The findings do not disclose the theory of the trial court on this branch of the case.

It is contended by appellant that defendants' claim of lien was barred, and they were estopped from asserting the same,

by the judgment entered in the foreclosure action and the judgment in the action to determine adverse claims. There is no finding of fact that this particular wire was involved in either of those actions. The court undoubtedly concluded that it was not, for such conclusion was necessary to the ultimate fact that defendants are entitled to the wire. If the wire was involved in either ⁴⁹³ of those actions, the judgments therein are beyond question conclusive against defendants, for Mendenhall was made a defendant therein, and failed to appear and defend. But the evidence is not conclusive that it was there involved, and we would not be justified in reversing the lower court on this theory of plaintiff's case. The complaints in those actions do not specially mention this particular wire, and there is no evidence in the record that it was specifically involved in either action. And inasmuch as the title thereto never passed from the street railway company to the motor company, and the possession thereof at all times remained with defendants, and no attempt was made in either of those actions to interfere with defendants' possession, we cannot say, as a matter of law, that the court should have found with plaintiff on this question. The evidence is not so clearly and palpably in plaintiff's favor as to justify us in doing so. Indeed, in the foreclosure action the complaint distinctly seeks to have adjudged invalid a lien alleged to be claimed by defendant by virtue of a judgment for the purchase price of the wire, but no mention is made of the lien here in question. Having given specific notice in the complaint that plaintiff sought relief against the asserted judgment lien, the plaintiff cannot now be heard to urge that all other claims of lien were necessarily involved and adjudicated in that action. The lien in question was not necessarily involved in the action to determine adverse claims; the wire had never become a part of the motor company's line, but instead remained personal property in the possession of defendants, and it is not usual to determine the title or right to the possession of personal property in an action of that nature.

Order affirmed.

Lienor of Vendor of Personalty.

Existence and Explanation of, Generally.—On a sale of goods, where nothing is specified as to delivery or payment, a presumption arises that the purchase price is to be paid as a condition precedent to delivery, and the seller has a lien on the goods sold for the purchase price, or, in other words, a right to retain them until the price is

paid: *Burke v. Dunn*, 117 Mich. 430, 75 N. W. 931; *Fishell v. Morris*, 57 Conn. 547, 18 Atl. 717; *Arnold v. Delano*, 4 Cush. 33, 50 Am. Dec. 754; *Palmer v. Hand*, 13 Johns. 434, 7 Am. Dec. 392; *Southwestern Freight etc. Co. v. Stanard*, 44 Mo. 71, 100 Am. Dec. 255; *Ware River R. R. Co. v. Vibbard*, 114 Mass. 447; *Haskins v. Warren*, 115 Mass. 533; *Bradeen v. Brooks*, 22 Me. 463; *Milliken v. Warren*, 57 Me. 46; *Bradley v. Michael*, 1 Ind. 551; *Cornwall v. Haight*, 8 Barb. 327; *Carlisle v. Kinney*, 66 Barb. 363; *White v. Welsh*, 38 Pa. St. 420; *Moore v. Newbury*, 6 McLean, 472, Fed. Cas. No. 9772; *Gay v. Hardeman*, 31 Tex. 245.

Perhaps the leading case on the vendor's lien for the purchase price of personalty is that of *Conrad v. Fisher*, 37 Mo. App. 352, which treats the subject in all of its ramifications. In this case, Thompson, J., in delivering the opinion of the court, said: "To begin it should be observed that the existence of a vendor's lien always presupposes that the title to the goods has passed to the vendee, since it would be an incongruous conception that a vendor might have a lien upon his own goods. It is next to be observed that a vendor's lien is in no sense a right of rescission. On the contrary, it proceeds in affirmation of the contract, and as a means of its enforcement. It is in the nature of a pledge raised or created by the law, upon the happening of the insolvency of the vendee, to secure the unpaid purchase price, to the vendor. It is a mere right of detention and sale to satisfy the unpaid purchase money. At the outset, in every sale where the contrary is not stipulated, the implication of law is that the purchase price is to be paid, as a condition precedent, before the vendor shall be obliged to part with the goods. Although there is some controversy as to the nature of the insolvency which will give this right, yet it is agreed on all hands that an insolvency in the mercantile sense, an inability to pay one's debts as fast as they mature, evidenced by a stoppage of payment, an assignment for the benefit of creditors, a petition in bankruptcy or the like, is sufficient": *Conrad v. Fisher*, 37 Mo. App. 382, 383. In *Haskins v. Warren*, 115 Mass. 533, it was also said, that "in a sale of chattels, when the specific articles are set apart, or identified for the purpose, and there is no stipulation for credit, the sale, as between the parties, takes effect at once to pass the title to the purchaser, unless there is some agreement to the contrary, and the price is also due at the same time. Until delivery is complete and absolute the vendor has a lien for the purchase money and may retain possession until payment."

If a thing has been exchanged for another and a sum of money, the transaction is a sale to the extent of the money consideration and the creditor is entitled to a seller's lien: *Succession of Furniss*, 34 La. Ann. 1013.

If goods on which the seller's privilege is claimed have been sold in block, and for a lumping price, and the proof sustains the

privilege on a part and fails to sustain it on the remainder of the goods, the impossibility of separating the price is fatal to the allowance of the privilege: *Newman v. Cannon*, 44 La. Ann. 579, 10 South. 933. To the same effect where realty and personalty are sold in gross: *Alexander v. Hooks*, 84 Ala. 605, 4 South. 417; *Willkinson v. Parmer*, 82 Ala. 367, 3 South. 4; *Betts v. Sykes*, 82 Ala. 378, 2 South. 648.

The right to retain goods sold until the purchase price is paid is subject to some restrictions and modifications. Thus, a vendor's lien extends only to the price and not to any other claims which the seller may have against the buyer, as, for example, storage charges, etc., where the former acts as bailee or warehouseman, unless there is an agreement to that effect: *Conrad v. Fisher*, 37 Mo. App. 352. Again, the lien exists only when the property in the goods has passed to the buyer: *Carlisle v. Kinney*, 66 Barb. 303; *Conrad v. Fisher*, 37 Mo. App. 352.

The transfer of title without delivery is confined almost exclusively to cases arising between parties to a sale. Hence, the matter of a seller's lien must arise almost wholly between such parties. In order for the lien to exist, the goods themselves must be in the actual or constructive possession of the seller. "The right of lien depends on the possession, and to maintain it the vendor must have the actual or constructive possession of the goods. After they come into the possession of the buyer, according to the terms of the contract, the lien is extinguished, and the goods cannot be reclaimed on the buyer's becoming insolvent": *Parks v. Hall*, 2 Pick. 206-212. The vendor of personal property has no lien for the unpaid purchase money, after parting with the possession; but must look alone to the personal responsibility of the vendee: *Slack v. Collins*, 145 Ind. 569, 42 N. E. 910; *Fishell v. Morris*, 57 Conn. 547, 18 Atl. 717; *Welsh v. Bell*, 32 Pa. St. 13; *Owens v. Weedman*, 82 Ill. 409; *Lupin v. Marie*, 6 Wend. 77, 21 Am. Dec. 256; *Straus v. Rothan*, 102 Mo. 261, 14 S. W. 940; *Brownwell v. Barnard*, 116 Mo. 667, 22 S. W. 503; *Lewis v. Steiner*, 84 Tex. 364, 19 S. W. 516. It is the duty of a claimant of a common-law lien upon property to retain its possession, so far as the nature of the articles will permit, and in order to protect innocent third persons dealing with the owner of the property in relation thereto, there should be a continuous possession from such owner to the claimant: *Smith v. Greenop*, 60 Mich. 61, 26 N. W. 832.

If the goods are to be paid for upon delivery, and, upon delivery being made the buyer refuses to pay, the seller, by virtue of his lien, may resume possession, and if delivery is partially completed and the buyer sells or pledges the goods received to a third person, without notice to the seller, the latter's lien is not affected, and he may recover from such subsequent purchaser: *Palmer v. Hand*, 13 Johns. 434, 7 Am. Dec. 392; *Cornwall v. Haight*, 8 Barb. 327.

If timber has been sold upon the land where it is cut, and then re-sold by the buyer, and removed to the land adjoining, which is also owned by the first seller, where it is measured and part of it carried away by the second buyer, but upon the first buyer becoming insolvent the seller forbids the second buyer to carry away the remainder of the timber unless he promises to pay therefor, the seller does not lose his lien upon the timber remaining upon his land; *Haskell v. Rice*, 11 Gray, 240.

As between the vendor and vendee, and in cases where the rights of subsequent purchasers of the vendee are not concerned, a vendor's lien for the purchase price is not divested by any species of constructive delivery so long as the vendor retains the actual custody of the goods, either by himself or his agent or servant: *Conrad v. Fisher*, 37 Mo. App. 352-354. In a case of sale where title has passed, and the goods have been constructively delivered, possession cannot be coerced until payment is made, for so long as the vendor retains and has not surrendered possession, his lien exists, and though there may be a delivery which will pass the title, it does not necessarily destroy the lien: *Southwestern Freight etc. Co. v. Stanard*, 44 Mo. 71, 100 Am. Dec. 255. A seller for cash of lumber, which remains in his yard, is not deprived of his lien for the purchase price, as against a purchaser from the buyer, by setting it apart in such manner as to constitute a constructive delivery sufficient to vest title in the buyer. In such case the second buyer must take notice that the original seller is claiming a lien on the lumber for the unpaid purchase price: *Perrine v. Barnard*, 142 Ind. 448, 41 N. E. 820; *McElwee v. Metropolitan Lumber Co.*, 69 Fed. 302; *Arnold v. Delano*, 4 Cush. 33, 50 Am. Dec. 754. A vendor may assert his lien in case of the insolvency of the vendee before payment, even if credit is given, and may retain the goods, if in his actual possession, or may stop them in transitu: *Arnold v. Delano*, 4 Cush. 33, 50 Am. Dec. 754; *Merchants' etc. Bank v. Hewitt*, 3 Iowa, 93, 66 Am. Dec. 49; *Ware River R. R. Co. v. Vibbard*, 114 Mass. 447; *Conrad v. Fisher*, 37 Mo. App. 352-354. But a vendor has no lien on goods in case of the purchaser's insolvency if, prior thereto, the goods have been delivered to an agent for the purchaser, and the latter has sold them and assigned the contract to a third person for value, and directed the agent to deliver them, and the agent has accordingly charged the goods to the assignee: *Ford v. Sproule*, 2 A. K. Marsh. 528, 12 Am. Dec. 439.

A seller's lien for the purchase price is confined to the subject matter of the sale, and does not extend to goods which have been mingled with those sold. Thus, if goods sold have been mixed with others of the buyer, the seller claiming a lien must be able to show clearly that they remain capable of complete identification and he must identify them with reasonable certainty: *Newman v. Cannon*, 43 La. Ann. 712, 9 South. 439.

Lien Created by Contract.—Although the lien of the seller for the unpaid purchase price of goods exists at common law without any express agreement, and is impliedly a part of every contract of sale, yet there is nothing to prevent a new and different lien from arising by contract of the parties which does not necessarily possess the same elements, or become subject to the same limitations as the common-law lien, but which depends wholly and entirely upon the terms of the agreement of the parties creating it: *Gregory v. Morris*, 96 U. S. 619; *Bunn v. Valley Lumber Co.*, 51 Wis. 376, 8 N. W. 232. Thus, the rule of the common law, that the lien of the vendor of personalty, to secure the payment of the purchase money is lost by the voluntary and unconditional delivery of the property to the purchaser, does not prevent the parties from contracting for a lien which, as between themselves, will be good after delivery: *Gregory v. Morris*, 96 U. S. 619. When the common law raises the lien, possession must be continued. But there is nothing in the law to prevent parties from making a lien by contract, and stipulating the mode of retaining or rescinding it: *Sawyer v. Fisher*, 32 Me. 28. The main difference between the common-law lien and the one arising by contract is, that in the case of the latter, possession of the thing to be charged is not essential, while in the former it is: *Peck v. Jenness*, 7 How. 620. Under the contract lien possession by the seller may or may not be essential. It is not so unless the agreement requires it: *Burnham v. Marshall*, 56 Vt. 365. This lien is not destroyed by any possession taken by the buyer, if authorized by the contract and in the usual course of such business: *Bradeen v. Brooks*, 22 Me. 463. If the vendor retains a lien by contract to secure the payment of the purchase price such lien is enforceable even after the vendor has parted with the possession of the property: *Horr v. Powe*, 18 Wash. 536, 52 Pac. 235. It is also competent for the parties to contract that the seller shall retain a lien upon the article sold as well as the thing into which it shall be manufactured, and in such case the lien will attach to the new article as fast as it comes into existence: *Dunning v. Stearns*, 9 Barb. 630. It has been held that this contract lien can be created as well by verbal as by written agreement: *Burnham v. Marshall*, 56 Vt. 365; but this doctrine is denied in *Gay v. Hardeman*, 31 Tex. 245, where it is held that such lien cannot arise by parol agreement. The lien is sometimes given by virtue of statute and "the same virtue exists in these statute liens, in which the possession does not pass, that existed in those at common law when they were accompanied by possession. They hold the property in the same degree and force": *Grant v. Whitwell*, 9 Iowa, 157. The proper means of enforcing this contractual lien is by bill in equity: *Holly Mfg. Co. v. New Chester Water Co.*, 48 Fed. 879; *Lowden v. Robertson*, 40 La. Ann. 825, 5 South. 405. Under statutes it may sometimes be enforced by attachment: *Napa Valley Wine Co. v. Rinehart*, 42 Mo. App. 171.

Devestment of Lien—Payment.—As the lien of the seller is solely for securing the price of the goods sold, it is manifest that it is devested when full payment is made or tendered: *Cory v. Barnes*, 63 Vt. 456, 21 Atl. 384. Part payment, however, does not devest the lien, since it exists over the entire mass, and is only removed by payment in full: *Hodgson v. Loy*, 7 Term Rep. 445.

Waiver.—The seller's lien for the purchase price of the goods may be expressly waived, and the right of lien is deemed to be waived when the party enters into a special agreement inconsistent with the existence of the lien, or from which a waiver of it may be fairly inferred: *Pickett v. Bullock*, 52 N. H. 354. It is well settled that a vendor's lien on goods is waived by giving credit for the price: *Arnold v. Delano*, 4 Cush. 33, 50 Am. Dec. 754; *Southwestern Freight etc. Co. v. Stanard*, 44 Mo. 71, 100 Am. Dec. 255; *Conrad v. Fisher*, 37 Mo. App. 352; *Leonard v. Davis*, 1 Black, 476; *Thompson v. Wedge*, 50 Wis. 642, 7 N. W. 560; *McNail v. Ziegler*, 68 Ill. 224. The vendor may, however, resume his lien, in case of the insolvency of the vendee before payment, though credit is given, and may retain the goods if they are in his actual possession: *Arnold v. Delano*, 4 Cush. 33, 50 Am. Dec. 754; *Southwestern Freight etc. Co. v. Stanard*, 44 Mo. 71, 100 Am. Dec. 255.

The lien may be waived when the seller takes some other security for the price and its payment. Thus, where goods are sold under express agreement that the note of a third person is to be taken in payment, and such note is duly tendered, this constitutes payment and a waiver of the lien: *Des Arts v. Leggett*, 16 N. Y. 582; *Benedict v. Field*, 16 N. Y. 595. But such lien is not waived by the act of the vendor in resorting to any other security which he may have, provided such security is not in itself a security of such nature as waives or discharges the lien: *Conrad v. Fisher*, 37 Mo. App. 352. Merely giving a note payable on demand for the amount of the purchase price does not operate as a waiver of the lien. Thus, such lien is not waived, in the absence of an express agreement to that effect by taking the note or other personal security of the vendee for the unpaid purchase money: *Bristol v. Pearson*, 107 N. C. 562, 22 Am. St. Rep. 900, 12 S. E. 451. And a vendor of personalty who has possession of it at the time of the insolvency of the vendee may enforce a vendor's lien against it for the unpaid purchase price, although he has previously accepted the notes of the vendee for the full amount of such purchase price and they remain unnegotiated in his hands: *Milliken v. Warren*, 57 Me. 46, *Vogelsang v. Fisher*, 128 Mo. 386, 31 S. W. 13; *Thompson v. Baltimore etc. R. R. Co.*, 28 Md. 396; *White v. Welsh*, 38 Pa. St. 420. And if at the time when the note falls due or the credit expires the seller still retains possession of the goods, his lien revives and continues until payment: *Owens v. Weedman*, 82 Ill. 409.

Delivery.—As has already been seen, possession of the property, actual or constructive, by the seller is essential to the existence of

the lien. Hence, it necessarily follows that whenever there has been a delivery to the buyer in performance or execution of the contract of sale, the lien is divested: *Blackshear v. Burke*, 74 Ala. 239; *Obermier v. Core*, 25 Ark. 562; *Gregory v. Morris*, 96 U. S. 619; *Manchester Locomotive Works v. Truesdale*, 44 Minn. 115, 46 N. W. 301; *Lupin v. Marie*, 6 Wend. 77, 21 Am. Dec. 256; *Jenkins v. Eichelberger*, 4 Watts, 121, 28 Am. Dec. 691; *Lewis v. Steiner*, 84 Tex. 364, 19 S. W. 516; *Slack v. Collins*, 145 Ind. 569, 42 N. E. 910; *Welsh v. Bell*, 32 Pa. St. 13. In *Parks v. Hall*, 2 Pick. 212, the court said: "The right of lien depends on possession, and to maintain it a vendor must have the actual or constructive possession of the goods. After they come into the possession of the buyer according to the terms of the contract, the lien is extinguished, and the goods cannot be reclaimed on the buyer's becoming insolvent. It has been doubted whether a constructive delivery is sufficient to take away the vendor's right of lien, and perhaps it would be going too far to say that in every possible case a constructive delivery will have this operation; but generally it is immaterial whether the delivery is actual or constructive. In many cases it has been held that the vendor's right of lien has been defeated when the delivery has been constructive only." And in *Arnold v. Delano*, 4 Cush. 38, 50 Am. Dec. 754, the court said: "There is manifestly a marked difference between those acts, which, as between the vendor and vendee, upon a contract of sale, go to make a constructive delivery, and vest the property in the vendee, and of actual delivery by the vendor to the vendee, which puts an end to the right of the vendor to hold the goods as security for the price. As between the vendor and vendee, and in cases where the rights of subsequent purchasers of the vendee are not concerned, the lien is not divested by any species of constructive delivery, so long as the vendor retains the actual custody of the goods, either by himself or by his agent or servant": *Conrad v. Fisher*, 37 Mo. App. 354. In this case it was said that the "delivery of a bill of lading, warehouse receipt, bought and sold note, delivery order, sale ticket, carrier's receipt, or any other writing intended by the parties or made by commercial usage a symbol of the goods themselves, passes constructive possession to the buyer, and yet nothing is more clear than that as between the seller and buyer themselves, and in many cases between the seller and subbuyer, the latter being a bona fide purchaser for a valuable consideration, such symbolical delivery does not divest the seller's lien, provided the seller remains in actual custody of the goods": *Conrad v. Fisher*, 37 Mo. App. 352; *Allen v. Jones*, 24 Fed. 11; *Southwestern Freight etc. Co. v. Plant*, 45 Mo. 517; *Southwestern Freight etc. Co. v. Stanard*, 44 Mo. 71, 100 Am. Dec. 255. "The lien of the vendor always exists until he voluntarily and utterly resigns the possession of the goods sold and all right to retain them. So long as the vendor does not surrender the actual possession, his lien remains, although he may have performed acts which amount

to a constructive delivery so as to pass the title. In all cases of symbolical delivery, which is the only species of constructive delivery sufficient to give a final possession to the vendee, it is only because of the manifest intention of the vendor utterly to abandon all claim and right of possession, taken in connection with the difficulty or impossibility of making an actual or manual transfer, that such delivery is considered sufficient to annul the lien of the vendor: *Thompson v. Baltimore etc. R. R. Co.*, 28 Md. 407.

Delivery of the goods to a common carrier, as agent for the buyer, is such a constructive delivery, and parting with the actual possession of the goods by the seller divests his lien and leaves him only his right of stoppage in transitu alone: *Boyd v. Mosely*, 2 Swan, 660; *Conrad v. Fisher*, 37 Mo. App. 352. Upon a sale of goods on credit a delivery of part of them to the buyer does not prevent the lien of the seller attaching to the part remaining in his possession, if the buyer becomes insolvent: *Hamburger v. Rodman*, 9 Daly, 93; *Buckley v. Furniss*, 17 Wend. 504. The mere marking of the goods in the buyer's name and setting them apart or boxing them up under his order does not destroy the lien if the seller still retains the goods and has not agreed to give credit: *Conrad v. Fisher*, 37 Mo. App. 354, 355. "The mere fact that, by agreement between the vendor and vendee, something remains to be done to the goods by the vendor, is not conclusive that there has not been such a delivery as cuts off the vendor's lien, but creates a prima facie presumption to that effect, which may be rebutted by circumstances. If the thing remaining to be done was intended to prepare the goods for delivery, the lien continues, but if the facts essential to a delivery have taken place, and the thing remaining to be done is merely in the nature of subsequent service by the vendor with reference to the goods, the lien is discharged. If, therefore, the goods, at the time the contract of sale is made, though in the legal custody and control, are not in the actual possession of the vendee, and are so situated that he cannot obtain actual possession until a specific act is done by the vendor, and the vendee becomes insolvent before this act has been done or the actual possession of the goods has been changed, the vendor may detain the goods as security for the payment of the contract price": *Conrad v. Fisher*, 37 Mo. App. 355. If, however, the delivery of the goods sold has been absolute, there is no lien for the price, though the purchaser is insolvent and has full knowledge of his inability to pay: *Johnson v. Farnum*, 56 Ga. 144.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

BRINK v. WABASH RAILROAD COMPANY.

[160 Mo. 87, 60 S. W. 1058.]

NEGLIGENCE CAUSING DEATH — DAMAGES FOR, FOUNDED ON DECEASED'S INABILITY TO PERFORM A CONTRACT.—Though a passenger of a railway company is killed through its negligence, the fact that he is thereby prevented from carrying out the terms of a contract, by which he is to contribute a certain amount of his earnings monthly to the support of his parents, does not give the parents a cause of action against the railway company, where it was not a party to the contract and not in any way interested therein.

L. M. Conkling, for the appellants.

George S. Grover, for the respondent.

90 **BURGESS, J.** This is an action by plaintiffs, husband and wife, and parents of F. W. Brink, deceased, against defendant, to recover damages claimed to have been sustained by and through the wrongful acts of the defendant in destroying the deceased and thereby preventing him from carrying out the terms of a contract entered into between himself and plaintiffs for their support and maintenance.

The facts, briefly stated in the petition, are about as follows: On the twenty-sixth day of June, 1897, and for some time prior thereto, plaintiffs' said son was, and had been, a mail clerk or agent in the mail or postal service of the government of the United States, and while en route from Kansas City, Missouri, east on defendant's road in the discharge of his duties, and as a passenger of defendant, at a point on its road in Clay county where it crosses a stream by means of a bridge over a creek, called and known as Rose creek, defendant's train of cars upon which plaintiffs' said son was a pas-

senger, by reason of the carelessness and negligence of defendant's servants and employes in charge of the train, left the track while crossing or about to cross said bridge, by reason of which it displaced some part of the structure of said bridge and it gave way, precipitating the entire train of cars into the creek, killing plaintiffs' said son immediately. That at the time of ⁹¹ the death of plaintiffs' said son and prior thereto, they had a contract with him by which he contributed a certain amount of his earnings monthly to their support, and by reason of the carelessness and negligence of defendant in causing his death the performance of said contract on the part of their son with them has been rendered impossible, to their damage in the sum of five thousand dollars, for which they ask judgment.

Defendant demurred to the petition upon the ground that it fails to state a cause of action. The demurrer was sustained, and plaintiffs declining to plead further, judgment was rendered in favor of defendant. The case is before us upon plaintiffs' appeal.

It is well understood that the common law of England has been in force in this state ever since its admission into the Union of states. It was adopted by the territorial assembly in 1816: *Lindell v. McNair*, 4 Mo. 380. So that, as we have no statute upon which an action of the character of the one at bar can be predicated, it must necessarily be based upon the common law, if any of its principles furnish a bottom for it to stand upon.

Plaintiffs in their brief call our attention to several authorities which they insist sustain the position that such an action may be maintained, but without reviewing them here, we think the great weight of authority, and that which is sustained by better reason, the other way. *Baker v. Bolton*, 1 Camp. 493, was an action against defendants as proprietors of a stage-coach, on the top of which plaintiff and his wife were riding when it overturned, whereby they were both hurt, the plaintiff bruised and the wife so seriously injured that she died about a month thereafter. The declaration, besides other special damage, stated that by means of the premises the plaintiff had wholly lost, and been deprived of, the comfort, fellowship, and assistance ⁹² of his said wife, and had from thence hitherto suffered and undergone great grief, vexation, and anguish of mind. The plaintiff was much attached to his wife, and being a publican, she had been of great use to him in conducting

his business. Lord Ellenborough said: "The jury could only take into consideration the bruises which he himself sustained, and the loss of his wife's society, and the distress of mind he had suffered on her account, from the time of the accident till the moment of her dissolution. In a civil court, the death of a human being cannot be complained of as an injury; and in this case the damages as to the plaintiff's wife must stop with the period of her existence."

In *Barker v. Hannibal etc. Ry. Co.*, 91 Mo. 86, 14 S. W. 280, it was said: "It may be observed that damages for a tort to the person, resulting in death, were not recoverable at common law, nor could husband or wife, parent or child recover any pecuniary compensation therefor against the wrongdoer. Our statute on this subject both gives the right of action and provides the remedy for the death, where none existed at common law."

In *Insurance Co. v. Brame*, 95 U. S. 754, the plaintiff sued Brame to recover the sum of seven thousand dollars, upon the ground that it had insured the life of one McLemore, a citizen of Louisiana, for that amount, in favor of third parties, and that while its policies were in force Brame shot and killed McLemore, thereby causing damages to plaintiff in the amount of the policies on the life of deceased, which amount plaintiff acknowledged to be due, and a part of which it had paid. Plaintiff contended that the killing of deceased was an injury to, or a violation of, a legal right or interest of the company, and that as a consequence thereof it sustained a loss which was the proximate effect of the injury. The answer of defendant⁹³ to plaintiff's contention was that the loss was the remote and direct result merely of the act charged; that at the common law no civil action lies for an injury which results in the death of the party injured, and that the statutes of Louisiana upon that subject did not include the case. The court observed: "The authorities are so numerous and so uniform to the proposition that by the common law no civil action lies for an injury which results in death; that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts and in many of the state courts, and no deliberate, well-considered decision to the contrary is to be found." A similar rule is announced in 1 *Hilliard on Torts*, fourth edition, page 87, and in *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. Rep. 140.

The defendant was not a party to the contract between plaintiffs and their deceased son, nor was it in any way interested therein, and we know of no rule of law by which it can be held liable under such circumstances for its nonperformance, although it may have been prevented by the death of the son, and his death may have been occasioned by the negligence of defendant. Now, where a person is entitled to the services of another—for instance, a servant—and he is wrongfully enticed away, and his master or employer is by reason thereof deprived of his services, he will be entitled to recover damages against the wrongdoer, but the case at bar is not of that character, but is bottomed upon the claim as alleged, that defendant prevented the performance of a contract entered into by plaintiffs and their son by which he had undertaken to support and maintain them during their lives, by carelessly and negligently killing him, when at the same time they could not at common law have maintained an action against it, on account of his death. If plaintiffs are entitled to recover in this action, it logically follows that they could in a common-law action for ⁹⁴ the death of the son, and might in the same action recover damages for the prevention of the performance of the contract of the son, by killing him, and this no one will contend they could do. The one is the sequence of the other. However, the case of *Insurance Co. v. Brame*, 95 U. S. 754, settles this question beyond controversy, and adversely to the contention of plaintiffs.

But there is another and still further reason why the plaintiffs' petition does not state a cause of action, and that is, the damages claimed are too remote. There is no allegation in the petition, nor is it pretended, that plaintiffs' son was killed with a willful intent to injure the plaintiffs, and it is only under such circumstances that plaintiffs would be entitled to recover. In *Gregory v. Brooks*, 35 Conn. 437, 95 Am. Dec. 278, it was held that when one is injured by the wrongful act of another, and others are indirectly and consequentially injured, but not by reason of any natural or legal relation, the injuries of the latter are too remote to constitute a cause of action, but the rule is different where the injury is done to one with a malicious intent to injure another through a contract relation.

In *Taylor v. Neri*, 1 Esp. 386, it was held that damages resulting to a plaintiff by reason of the defendant's having assaulted and beaten an actor, whereby the latter was disabled from fulfilling an engagement with the plaintiff, are too re-

mote. So in the case of Connecticut Mutual Life Ins. Co. v. New York etc. R. R. Co., 25 Conn. 265, 65 Am. Dec. 571, it was held that where one person has contract relations with another, an injury to the latter which affects disastrously those relations does not constitute a legal injury to the former; that where an insurer has been compelled to pay the insurance on the life of a person whose death has been ⁹⁵ caused by the unlawful act of a third person, and where there is no privity of contract between the insurer and the wrongdoer, and no direct obligation of the latter to the former growing out of the relation of the wrongdoer to the insured, by contract or otherwise, though the loss of the insurer is due to the acts of the wrongdoer, yet as those acts affect the insurer only through his artificial relation of contractor with the insured, the loss is a remote and indirect consequence of the act of the wrongdoer, and no action therefor can be sustained against him by the insurer.

For these considerations the judgment should be affirmed, and it is so ordered.

Sherwood, P. J., and Gantt, J., concur.

WRONGFUL DEATH.—DAMAGES FOR NEGLIGENTLY causing the death of a human being and the measure and elements thereof are discussed in the monographic notes to *Brown v. Electric Ry. Co.*, 70 Am. St. Rep. 679, 680; *Louisville etc. Ry. Co. v. Goodykoontz*, 12 Am. St. Rep. 375-383. The standard for the measurement of damages is the pecuniary value of the life of the person killed to the beneficiaries: *Missouri Pac. Ry. Co. v. Moffatt*, 60 Kan. 113, 72 Am. St. Rep. 343, 55 Pac. 837. See, further, the recent cases of *Mulhall v. Fallon*, 176 Mass. 266, 79 Am. St. Rep. 309, 57 N. E. 386; *Burk v. Arcata etc. R. R. Co.*, 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1065.

STATE v. SPENCER.

[160 Mo. 118, 60 S. W. 1048.]

HOMICIDE — UNCOMMUNICATED THREATS. — Uncommunicated threats afford no justification for killing. Hence, it is proper to instruct the jury to disregard evidence of threats, if they believe that the deceased was not assaulting, or attempting to assault, the defendant, and that he was not making any hostile, or apparently hostile, demonstration toward the defendant at the time of the homicide.

P. H. Cullen and W. W. Botts, for the appellant.

Edward C. Crow, attorney general, and Samuel B. Jeffries, assistant attorney general, for the state.

120 GANTT, J. The defendant was indicted, tried, and convicted of murder in the second degree in the Audrain circuit court. From the conviction he appeals.

The evidence establishes that both the defendant and Benjamin Eddelman resided in Vandalia, Audrain county, on December 25, 1899. Eddelman was a nightwatch. The city paid him twenty-five dollars a month and the merchants and others supplemented his salary. **121** He was about thirty-nine years old. The defendant was twenty-five years old. John Adkins kept a saloon in Vandalia. He drew the color line by having separate bars for the whites and negroes who patronized him. About noon on Christmas Day defendant had been drinking and made a disturbance in the saloon. He had pulled his coat and it would seem had started to make an assault with a knife on Eddelman, who was standing behind the bar. Eddelman drew a pistol, which it afterward appeared was empty, and ordered defendant to drop his knife. Thereupon other parties intervened and took defendant out of the saloon. After leaving the saloon the defendant went to a livery-stable close by. The mayor of the town, Mr. Smellzer, went to him and warned him that he must not create any disturbance, and he expressed a willingness to fight the mayor, who told him he didn't want to fight him, but would have no trouble. Defendant then said he had had a racket in the saloon and Eddelman had drawn his gun on him. The mayor told him he must be quiet; that Eddelman had gone home. Whereupon defendant said, "I will go down after him." Defendant was in a bad humor. After dinner defendant came to the saloon again and was standing in front of it, and Eddelman, the deceased, was in front of a meat market just across an alley. He was talking to Eddelman, whereupon the mayor again told defendant he must keep quiet or he would have to lock him up, whereupon deceased said to the mayor, "John, lock him up; I don't want any more trouble with him this day." Defendant was very mad.

Two of defendant's friends then asked permission to take care of him and started off with him, and they went over to the hotel. About 2 o'clock Eddelman, the nightwatch, was in **122** the saloon, standing near the corner of the counter and the ice-chest. Defendant again appeared at the saloon armed with a

revolver. He came in the front door and started back into the middle room, when his friend, Hesser, put his hands across the door to stop him, whereupon Adkins, the proprietor of the house, said to him, "You can't come in here." He said he wanted to see Adkins. Defendant came up to Adkins and said, "John, didn't you call Ben Eddelman in here to put me out?" and Adkins told him he didn't want any disturbance; if there was, he would put him out. He promised there should be no trouble. He then passed into the room where Eddelman was standing.

The defendant made his way to Eddelman, and several of the eye-witnesses testified that as soon as he got in reach of him he grabbed deceased by the throat with his left hand and simultaneously remarked, "Now I have got you." He held his pistol in his right hand over Eddelman's head and fired, the shot entering about two inches to the rear and above the ear, and penetrating the brain. Eddelman sank in his tracks and Adkins ran to him and laid him out on the floor. Defendant backed out of the saloon and ran south. He was apprehended by the mayor and locked up in the calaboose.

There was evidence of threats made by Eddelman against deceased and some very slight evidence that deceased was making some demonstration against defendant when defendant grappled with him and shot him. The circuit court gave elaborate instructions on murder in the first and second degrees and manslaughter in the fourth degree and self-defense.

Upon an inspection of the record we discover no error whatever in the record proper, nor in the admission or rejection of evidence.

The instructions are not criticised save one, which is as follows: ¹²³ "The court instructs the jury that the evidence of threats made by deceased against defendant was admitted in the case solely because there was evidence showing, or tending to show, that just before the deceased met his death he was making, or attempting to make, an assault on the defendant, and if from all the facts and circumstances in evidence the jury believe that at the time or just before defendant shot deceased, the deceased was not assaulting, or attempting to assault, the defendant or making any hostile, or apparently hostile, demonstration toward defendant, then you are instructed to disregard, and not in any way consider, the evidence of threats made by deceased against defendant in arriving at your verdict." To the giving of which instruction the defendant

objected, but the court overruled the objection and the defendant excepted and saved his exceptions at the time.

The giving of this one instruction counsel for defendant assigns as error in this court.

A great array of authorities is marshaled to sustain the proposition that uncommunicated threats made by the deceased are admissible when there is doubt as to who is the aggressor in an affray, as tending to prove who was in fact the aggressor, but there is no doubt this is the law. It has been iterated and reiterated by this court: *State v. Bailey*, 94 Mo. 316, 7 S. W. 425; *State v. Sloan*, 47 Mo. 610; *State v. Harrod*, 102 Mo. 609, 15 S. W. 373; *State v. Elkins*, 63 Mo. 165. And so the circuit court construed the law and admitted the evidence of the threats, those that were not communicated and those that were. No error was made in excluding them. This much the learned counsel for defendant concede, but they insist that in giving the instruction complained of, the court virtually withdrew them.

We do not so understand the instruction. On the contrary, we think it plainly tells the jury that notwithstanding ¹²⁴ they may believe deceased made the threats imputed to him by defendant and his witnesses, yet, if from the facts and circumstances in evidence, including necessarily the threats which were in evidence under the sanction of the court, the jury believe that at the time, or just before, defendant shot the deceased, the deceased was not assaulting, or attempting to assault, defendant, and was not making any hostile demonstration, or apparently hostile demonstration, toward defendant, then such threats afforded defendant no justification for killing deceased, and should be disregarded in making up their verdict.

This instruction was substantially approved in *State v. Rider*, 95 Mo. 484, 8 S. W. 723, in which the jury were instructed that although deceased had made threats against defendant, that alone would not palliate, justify, or excuse defendant if at the time defendant shot deceased, deceased was making no attack or assault upon defendant and was making no demonstrations of violence toward him. This court then remarking of this instruction, "Nor can anything therein contained be fairly construed to intimate to the jury that such threats might not be considered by them for any legitimate purpose in the case."

So in *State v. Eaton*, 75 Mo. 592, this court said: "We are not to be understood as giving sanction to the doctrine that a threatened man may hunt the threatener, and slay him because of the threat. Such is not the law of this state. Although it has occasionally, in some of the states, had the sanction of their highest judicial tribunals, we think we may safely say that it is not permanently embodied in the jurisprudence of any state in the Union. The person threatened has no right to take the life of another, unless that other, when they meet, by his conduct manifests a purpose to carry the threat into execution; but such purpose may be manifested by conduct falling short of personal violence or an actual assault."

So understanding the law, the circuit court did not limit ¹²⁵ defendant's right to defend himself to an actual assault or personal violence, but permitted him to act upon the threats, if any, in connection with any hostile demonstration, or apparently hostile demonstration, and in so doing gave him the full measure of the law in his behalf.

In this case the evidence on both sides clearly shows that the defendant deliberately sought the deceased; that deceased was making no effort to execute any threat previously made, if indeed he made any such, and did not seek the difficulty with defendant, but endeavored to avoid it, and was not the aggressor. Under such circumstances the threats, if any, did not palliate or excuse the homicide, and so the court properly instructed the jury: *State v. Taylor*, 64 Mo. 358; *State v. Eaton*, 75 Mo. 586.

As no other error is assigned, and we discover none in our own examination, the judgment must be and is affirmed.

In view of the facts disclosed, the defendant should esteem himself very fortunate in receiving so slight a punishment for so grave an offense.

Judgment affirmed.

Sherwood, P. J., and Burgess, J., concur.

HOMICIDE.—MERE WORDS OR THREATS do not generally justify one in taking life in the exercise of the right of self-defense: See the monographic note to *State v. Sumner*, 74 Am. St. Rep. 724. Yet it is said in *State v. Cushing*, 14 Wash. 527, 53 Am. St. Rep. 883, 45 Pac. 145, that threats made by a decedent a short time before a fatal encounter, both within and without the hearing of the defendant, are admissible in evidence on the trial of the latter for murder. And a similar doctrine is laid down in *Hart v. Commonwealth*, 85 Ky. 77, 7 Am. St. Rep. 576, 2 S. W. 673.

STATE v. THOMPSON.

[160 Mo. 333, 60 S. W. 1077.]

CONSTITUTIONAL LAW.—“BOOK-MAKING” AND “POOL-SELLING” constitute gaming or gambling, which the state may prohibit altogether, or may regulate and control by restricting the business to certain localities, or by prohibiting it in others.

CONSTITUTIONAL LAW—DELEGATION OF DETERMINING POWER IS NOT A DELEGATION OF LEGISLATIVE POWER.—In regulating gambling, such as “book-making” and “pool-selling,” the state can, without violating the constitution, make a law delegating a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. The power to grant a license, vested in some particular person, is not a delegation of legislative power.

CONSTITUTIONAL LAW—ACT CONCERNING BOOK-MAKING AND POOL-SELLING—DELEGATION OF LEGISLATIVE POWER—WHAT IS NOT.—A statute which prohibits “book-making” and “pool-selling” from being carried on, except at places mentioned in a license therefor, and which confers upon the state auditor the right to say what applicants for such a license are of good moral character, and what racecourses and fair-grounds are of good repute, and to grant licenses to such persons as he may think entitled thereto, is not unconstitutional, on the ground that it contains a delegation of legislative power. The power thus delegated is merely one to determine a fact.

CONSTITUTIONAL LAW—ACT CONCERNING BOOK-MAKING AND POOL-SELLING—CLASS LEGISLATION—WHAT IS NOT.—A statute which declares betting on horseracing to be gambling, and which authorizes it, but prohibits the business of “book-making” and “pool-selling” at all places except those mentioned in a license therefor, the granting of which is left by the statute to the discretion of the state auditor, is not vicious class legislation, either as to persons or place, because it embraces all persons alike who choose to place themselves within its reach, and is not in conflict with section 1, article 14 of the amendments to the federal constitution, but is a legitimate exercise of the police power of the state.

T. J. Rowe, for the appellant.

Edward C. Crow, attorney general, and Samuel B. Jeffries, assistant attorney general, for the state.

339 **BURGESS, C. J.** On the nineteenth day of January, 1900, the defendant was convicted in the St. Louis court of criminal correction, and fined one thousand dollars, under an information filed in said court against him and others, by the prosecuting attorney of said court, charging them with book-making and pool-selling, in violation of an act of the general assembly of the state of Missouri entitled, “An act to punish

book-making and pool-selling by unlicensed persons, to provide for the issuance of such a license and to dispose of the funds arising from such license," approved April 7, 1897, at No. 112 North Fourth street, in the city of St. Louis and state of Missouri, on the tenth day of October, 1899, by unlawfully engaging in book-making by means of a system of gambling, commonly called a book, upon the result of a certain contest of speed of beasts, known as horses, by certain persons, in the manner therein named, which was to take place thereafter on the tenth day of October, 1899, beyond the limits of the state of Missouri, and by then and there betting money with certain persons therein named on the result of said contests, etc. Defendant appeals.

The only question raised by defendant on this appeal is with respect to the validity of the act of the legislature, which he contends is unconstitutional, because violative of sections 1 and 53 of article 4 of the constitution of this state, and of section 1, article 14, of the amendments to the constitution of the United States.

Section 1 of article 4 of the state constitution provides that "the legislative power, subject to the limitations herein contained, shall be vested in a senate and house of representatives, to be styled 'The general assembly of the state of Missouri.'"

340 The act provides that no person shall record or register, by mechanical or other means, bets or wagers, or sell auction pools, or engage in any book-making, by or through any device, book, instrument, or contrivance, upon the result of any trial or contest of skill, speed, or power of endurance of man or beast, which is to take place within or beyond the limits of this state, without first having obtained a license as in the act provided.

Section 2 provides that any person of good reputation desiring to obtain a license to sell auction pools, make books, or register wagers or bets, by mechanical or other means, shall apply, in writing under oath, to the state auditor, for such license, stating that the contest upon which such pools, books, or wagers made are actually to take place upon the racecourse or fair grounds where he desires to carry on business, the character of the business he desires to conduct and the length of time; and the state auditor, if satisfied with the good character of such applicant and the good repute of the racecourse or fair ground upon which the applicant may desire to conduct such business, may issue a license authorizing him to do any

or all of the things provided therein. The auditor may refuse to issue license to any person to be used upon any racecourse or fair ground after such place or places have been operated for a period of ninety days in any one year.

Section 3 requires that no license shall be issued for less than three nor more than ninety days, and shall express upon its face the particular class of business which the applicant is permitted to conduct, and such license shall only authorize him to engage in pool-selling, book-making, or registering bets as expressed therein. It shall also state the number of books and registers to be used and the length of time and place where conducted, and no license shall be issued from the first day of November to the first day of April in each year.

³⁴¹ Section 4 prohibits the business being conducted at any other place than mentioned in the license, and prevents it being conducted at any other time than between 10 o'clock A. M. and 7 o'clock P. M.; and such person holding a license shall not be permitted to sell pools, accept or register bets from any minor.

Section 5 prescribes the penalty for the violation of any of the provisions of the act.

It is perfectly clear that "book-making" and pool-selling," within the scope and meaning of this act, are gaming or gambling, which the state may, in the exercise of its police powers, prohibit altogether, or may regulate and control by restricting it to certain localities, or by prohibiting it from being practiced in other localities. Thus, it was held in *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471, that an ordinance of the city of St. Louis licensing bawdy-houses was valid under the city charter, and that a license taken out in conformity with the ordinance would shield them from criminal proceedings by the state. Indeed, there is no conflict in the authorities upon this question, or the right of cities to suppress such houses, when authorized to do so by their charters.

In *St. Louis v. Fitz*, 53 Mo. 585, it is said: "There is no doubt of the power of the legislature, or of municipalities deriving their power from the legislature, to make police regulations designed to promote the health and morals of the community. Laws to prohibit or regulate gambling, sales of intoxicating liquors, houses of prostitution, and thus indirectly advance the morals and good order of society, are beyond question." Any practice, the tendency of which is to corrupt the morals of those who participate in or witness its practice is

a proper subject of regulation by the state; and that "book-making and pool-selling," and betting upon horseracing, are demoralizing in their tendencies, and hence evils which the law ³⁴² may legitimately suppress, without infringing upon the constitutional rights of any citizen, is no longer an open question.

In the case of *Ex parte Tuttle*, 91 Cal. 589, 27 Pac. 933, it is said: "Any practice or business, the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it, or to encourage idleness instead of habits of industry, is a legitimate subject for regulation or prohibition by the state; and that gambling, in the various modes in which it is practiced, is thus demoralizing in its tendencies, and therefore an evil which the law may rightfully suppress without interfering with any of those inherent rights of citizenship which it is the object of government to protect and secure, is no longer an open question. The measures needful or appropriate to be taken in the exercise of this police power are determined by legislative policy, and for this purpose a wide discretion is committed to the law-making body. Whether it shall entirely prohibit, or only regulate by confining such practices within prescribed limits; whether the law shall apply to every kind of gambling, or only to those games or wagers in which evil effects appear with greatest prominence, must be determined primarily by the legislative department of the state, or of the municipality authorized to exercise this great power, which is conferred for the purpose of securing the public safety and welfare; and unless it clearly appears that a statute or ordinance ostensibly enacted for this purpose has no real or substantial relation to these objects, and that the fundamental rights of the citizen are assailed under the guise of a police regulation, the action of that department is conclusive."

The same rule is announced in *State v. Donovan*, 20 Nev. 75, 15 Pac. 783; *Cooley's Constitutional Limitations*, 6th ed., 596. A similar question was before the supreme court of the United States in *L'Hote v. New Orleans*, 177 U. S. 596, 20 Sup. Ct. Rep. 791, in ³⁴³ which it was said: "In this respect we premise by saying that one of the difficult social problems of the day is, What shall be done in respect to those vocations which minister to and feed upon human weaknesses, appetites, and passions? The management of these vocations comes directly within the scope of what is known as the police power. They affect directly the public health and morals.

Their management becomes a matter of growing importance, especially in our larger cities, where from the very density of the population the things which minister to vice tend to increase and multiply. It has been often said that the police power was not by the federal constitution transferred to the nation, but was reserved to the states, and that upon them rests the duty of so exercising it as to protect the public health and morals. . . . Obviously, the regulation of houses of ill-fame, legislation in respect to women of loose character, may involve one of three possibilities: 1. Absolute prohibition; 2. Full freedom in respect to places, coupled with rules of conduct; or 3. A restriction of the location of such houses to certain defined limits. Whatever course of conduct the legislature may adopt is in a general way conclusive upon all courts, state and federal. It is no part of the judicial function to determine the wisdom or folly of a regulation by the legislative body in respect to matters of a police nature."

But defendant claims that section 2 of the act delegates legislative power to an executive officer, namely, the state auditor, in that it confers upon him the right to say who are persons of good character, what racecourses or fair grounds are of good repute, the right to grant a license to any person he believes of good reputation to make a book on A's racetrack, and upon the same person a license to make a book on C's track, etc.

While the legislature could not delegate to the state ³⁴⁴ auditor the power to make laws, it does not follow that it could not delegate to him the power to pass upon the character of persons applicant for license to sell auction pools, make books, or regulate wagers or bets upon contests to take place upon the racecourse where they desire to carry on the business, and to determine what racecourse and fair grounds are of good repute, and to grant to persons whom he may find to be of good character a license to sell auction pools thereon. The power delegated to the state auditor is not the power to make a law, but is a power to determine a fact or things, upon which the action of the law depends, and it cannot be said to be legislative in its character.

The state, in the exercise of its police regulations, may prohibit gambling altogether, or regulate it in such manner as it may see proper, and for that purpose may vest such officer as it may see proper with the power to pass upon the character of persons who apply for license for that purpose, as well also as the place where to be conducted and to grant license to such

person as he may think entitled thereto, to conduct their business at such times and places as he may think proper, not prohibited by law.

In passing upon a similar question in *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. Rep. 13, it was said: "The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only. As in many other cases, the officers may not always exercise the power conferred upon them with wisdom or justice to the parties affected. But that is a matter which does not affect the authority of the state; nor is it one which can be brought under the cognizance of the courts of the United States."

³⁴⁵ So in *Locke's Appeal*, 72 Pa. St. 491, 13 Am. Rep. 716, it is said: "The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend, which cannot be known to a law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation. . . . If the power to determine the expediency or necessity of granting licenses to sell liquors in a municipal division can be committed to a commission, a council, or a court, which no one can dispute, why cannot the people themselves be authorized to determine the same thing? If a determining power cannot be delegated, then there can be no power delegated to city councils, commissioners, and the like, to pass ordinances, by-laws, and resolutions in the nature of laws, binding and affecting both the persons and the property of the citizens. If a determining power cannot be conferred by law, there can be no law that is not absolute, unconditional, and peremptory, and nothing which is unknown, uncertain, and contingent can be the subject of law."

In *State v. Barringer*, 110 N. C. 525, 14 S. E. 781, it was held that a law which prohibits the manufacture of spirituous liquors within three miles of the Orphans' Home, near Barium Springs, in that state, without the written permission of the superintendent of the home, was a constitutional exercise of the power of police regulations.

The discretion vested in the state auditor is not arbitrary. He is by law made the state's agent, and is bound to exercise the discretion vested in him fairly and impartially for the just purpose of carrying out the intention of the law.

It is frequently the case that statutes require particular ³⁴⁶ things to be done to make that legal which would otherwise be illegal, which depend upon the judgment and discretion of a designated agent, officer, or person, and under such circumstances the discretion is not arbitrary, but is lawful when lawfully exercised.

Statutes and ordinances have been sustained forbidding orations, etc., in a park without the prior consent of the park commissioners: *Commonwealth v. Abrahams*, 156 Mass. 57, 30 N. E. 79; or upon the common or other grounds in the absence of the permission of the city committee; *Commonwealth v. Davis*, 140 Mass. 485, 4 N. E. 577; prohibiting the occupancy of a place on the street for a stand in the absence of permission of the clerk of Faneuil Hall Market: *In re Nightingale*, Petitioner, 11 Pick. 168; prohibiting the keeping of swine without a permit in writing from the board of health: *Quincy v. Kennard*, 151 Mass. 563, 24 N. E. 860; forbidding the erection of wooden buildings without the permit of the commissioners of the town through their clerk: *Commissioners etc. v. Covey*, 74 Md. 262, 22 Atl. 266, and forbidding the beating of drums in the traveled streets of a city, without the permission of the president of the board of trustees of the municipality: *In re Flaherty*, 105 Cal. 558, 38 Pac. 981.

In all of these cases, and numerous others that might be cited, the power to grant permission—in other words, a license—was vested in some particular person or persons, committee, or officers, and in none of them was it held that the power to do so was a delegation of legislative power.

Our conclusion is that the act is not violative of section 1 of article 4 of the state constitution.

A further contention is that the law in question violates section 53, article 4 of the state constitution, which provides that the "general assembly shall not pass any local or special law," in that it grants to corporations and individuals special or exclusive rights and immunities, and *State v. Walsh*, 136 ³⁴⁷ Mo. 400, 37 S. W. 1112, and *State v. Thomas*, 138 Mo. 100, 39 S. W. 481, are relied upon as supporting these contentions.

In *Walsh's* case, an act of the legislature (Laws 1895, p. 150) was held to be a special law and void under said section

53, upon the ground that "it takes book-makers, pool-sellers, and bet-mongers as a class, and divides them into two portions, one of which, to wit, that portion which assembles 'on the premises or within the limits or inclosure of a regular racecourse,' and renders the members of that portion immune from punishment, while another portion of the same genus, book-maker, pool-seller, or bet-monger who pursues his avocation outside or immediately outside of the sacred precincts of 'a regular racecourse,' is subject to fine and imprisonment."

In Thomas' case Walsh's case was approved, and it was held that the act of 1891 (Laws 1891, p. 122), which prohibits the selling of bets, "upon the result of any trial or contest which is to take place beyond the limits of this state," but exempts, by implication, all persons who make such wagers on "contests which are to take place within this state," is a special law, and in conflict with said section 53. And that the act is a special law, and void for the further reason that it separates offenders who gamble on events to occur outside of this state from those who do the same things as to events occurring within this state, prescribes punishment for the former, and protection to the latter, thus dividing natural classes into two portions, making two classes out of one, and arbitrarily enacts different rules for the government of each.

The act passed upon in Thomas' case made it a criminal offense to wager upon horseraces to take place out of this state, while wagering upon similar races to occur in this state were exempt, and it was correctly held that the law was special and therefore void.

The act adjudicated upon in the Walsh case (Laws 1895, 348 p. 150) provides: "That any person who keeps any room, shed, tenement, tent, booth, or building, or any part thereof, within this state, and who occupies same with any book, instrument, or device for the purpose of recording or registering bets or wagers, or selling pools upon the result of any trial or contest of skill, speed, or power of endurance of man or beast, which is to be made or to take place within or without this state, or any person who records or registers bets or wagers, or sells pools upon the result of any trial or contest of skill, speed or power of endurance, of man or beast, which is to be made or take place within or without this state; or, being the owner, lessee, or occupant of any room, tenement, shed, tent, booth, or building, or any part thereof, knowingly permit the same to be used or occupied for any of the purposes herein-

above set forth or therein keeps, exhibits, or employs any device or apparatus for the purpose of recording or registering such bets or wagers or selling of pools as are hereinabove set forth, or becomes the custodian or depositary for hire or privilege of any money, property, or thing of value which is staked, wagered or pledged contrary to the provisions of this act, shall be guilty of a misdemeanor, and on conviction shall be punished by imprisonment in the county jail for a term of not less than six months or more than one year, and by a fine of not less than one thousand dollars, or by both such fine and imprisonment; provided, that nothing in this act shall be so construed as to prohibit or make it unlawful for any person to engage in or register bets and wagers, make books, sell pools, or bet upon any trial or contest of speed of a horse, or between horses on the premises or within the limits or inclosure of a regular race-course on which such contest of speed is had, and at and prior to the time thereof; provided, that it shall be unlawful to make and sell said pools or book-bets to minors; and any person selling said pools and book-bets to any minor shall be deemed ³⁴⁹ guilty of a misdemeanor, and upon conviction, shall be punished by imprisonment in the county jail for a term of not less than three months or more than one year, and by a fine of not less than five hundred dollars."

Now, the only material difference between the act of 1895, passed upon and held to be invalid in the Walsh case, and the act in question in this case (Laws 1897, p. 100), is that under this act book-making and pool-selling are prohibited at all places except upon racecourses and fair grounds where the races are to be run, and then only upon the procurement of a license from the state auditor by any person who desires to engage in such business, while no license is provided for by the act of 1895.

Gaming, sales of intoxicating liquors, houses of prostitution, and any practice which tends to demoralize, weaken, and corrupt the morals may be regulated by the state and confined to certain localities, or prohibited altogether under its police powers without infringing upon the inherent rights of any of its citizens. "And unless it clearly appears that a statute or ordinance, ostensibly enacted for this purpose, has no real or substantial relation to these subjects, and that the fundamental rights of the citizen are assailed under the guise of a police regulation, the action of that department is conclusive": *Ex parte Tuttle*, 91 Cal. 589, 27 Pac. 933.

The sale of intoxicating liquors by retail is permitted in this state only under a license for that purpose, the business to be conducted at some particular building, and the power of the legislature to thus regulate its sale has never been called in question. So it was held by this court that a city ordinance licensing bawdy-houses in the city of St. Louis was valid under its charter: *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471; *State v. Debar*, 58 Mo. 395.

In *Ex parte Tuttle*, 91 Cal. 589, 27 Pac. 933, an ordinance of the city of ³⁵⁰ San Francisco, prohibiting the selling of pools on horseraces, except within the inclosure of a racetrack where the race is to be run, is a valid police regulation, not in conflict with the constitution of that state, and not void because its incidental effect may be to confer a special privilege or benefit upon those who can own or control the racecourses by giving them the exclusive right to carry on the business, or of selling to others the privilege of the pool-selling.

It was held in *Brennan v. Brighton Beach Racing Assn.*, 56 Hun, 188, 9 N. Y. Supp. 220, that by the laws of New York taxing race associations on their receipts, and declaring that "such racing and pool-selling in the state shall be confined to the period between the fifteenth day of May and the fifteenth day of October, in each year, and all pool-selling shall be confined to the tracks where the races take place, and on the days when they take place," it was the intention of the legislature to sanction pool-selling at the time and places fixed by the statute, and that a purchaser of a pool ticket at such a time and place may sue for his share in the pool.

In *Debardelaben v. State*, 99 Tenn. 649, 42 S. W. 684, the defendant was tried, convicted, and fined for betting upon a horserace while without the inclosure within which the race was run, and appealed. The law under which the conviction was had provides, among other things, that "horseracing, without regard to the distance which may be run, trotted, or paced, where the same is run, trotted, or paced upon a racetrack, or path made or kept for the purpose, and inclosed by a substantial fence, . . . but it shall be unlawful gaming to bet or wager in any way upon any horserace, unless the racetrack upon which the race is run, trotted, or paced be inclosed by a substantial fence, and the bet or wager be made within said inclosure, upon a race to be run, trotted, or paced within said inclosure." Held, that horseracing is indictable as gaming, under ³⁵¹ the laws of the state of Tennessee, unless the race

is run within a substantial inclosure, and the bet made therein, and that the statute is not vicious class legislation. That the class legislation is not arbitrary or capricious, as the law embraces all persons and affects alike all who are or choose to place themselves within its reach.

So in the case at bar, the law "embraces all persons alike who choose to place themselves within its reach," and is not, therefore, vicious class legislation, either as to persons or place.

And if bawdy-houses, the sale by retail of intoxicating liquors, and gambling, may be licensed by the state in the exercise of its police powers to be conducted by certain persons, at specified places, and prohibited at all others, in regard to which there can be no question, for the same reasons it must follow that the act of 1897, in declaring betting on horseracing to be gambling, and in authorizing it, and the licensing of book-making and pool-selling, to be carried on at certain race-courses, and in prohibiting it at all other places, is a legitimate exercise of the police power of the state.

The act is not in any way in conflict with section 1, article 14 of the amendments to the constitution of the United States.

Our conclusion is that the law is valid and that the judgment should be affirmed. It is so ordered.

All concur.

BOOK-MAKING AND POOL-SELLING.—BETTING on a horse-race is gambling, and book-making and pool-selling are each betting upon a horserace or a particular event: *St. Louis Fair Assn. v. Carmody*, 151 Mo. 566, 74 Am. St. Rep. 571, 52 S. W. 365. Pools on horseraces are "games": *People v. Weithoff*, 51 Mich. 203, 47 Am. Rep. 557, 16 N. W. 442.

HORSERACING.—FOR STATUTES REGULATING horseracing and race meetings, see *State v. Roby*, 142 Ind. 168, 51 Am. St. Rep. 174, 41 N. E. 145; *People v. Fallon*, 152 N. Y. 12, 57 Am. St. Rep. 492, 46 N. E. 296.

RICHARDSON v. COLE.

[160 Mo. 372, 61 S. W. 182.]

EXECUTORS AND ADMINISTRATORS—GENERAL RIGHT TO PERSONAL PROPERTY—PAYMENT OF DEBTS.—The legal title to personal property of an intestate decedent passes to the administrator, but the equitable title is in the distributees. The administrator has the legal title to the estate for the purpose of paying debts against it, but after they are paid, the residue of the estate goes to the heirs.

EXECUTORS AND ADMINISTRATORS—HEIRS, DISTRIBUTION BY AMONG THEMSELVES—PARAMOUNT RIGHT.—A public administrator is not entitled to the possession of personal property of an intestate decedent, where there are no debts, and the heirs, being of age, have by consent already made a domestic distribution of the estate among themselves.

EXECUTORS AND ADMINISTRATORS—ORDER TO TAKE CHARGE OF ESTATE—COLLATERAL ATTACK UPON—WHAT IS NOT.—To deny a public administrator the right to take charge of the personal property of an intestate, where there are no debts, and the heirs have already made a distribution of the estate among themselves, is not a collateral attack upon the order of the probate court directing him to take charge of the estate.

James A. Henderson and R. S. Macdonald, for the appellant.

Judson & Taussig, for the respondents.

375 **BURGESS, J.** On May 13, 1884, Lillie Kate Fagin died intestate and unmarried, the owner of personal property consisting of cash, notes and bonds of the face value of nine thousand three hundred and forty-two dollars and seventeen cents, and the bonds in litigation of the face value of seven thousand eight hundred and eighty-seven dollars, which had theretofore been placed by her father, Aaron W. Fagin, now deceased, in the hands of the defendant Nathan Cole, who had married her sister, to hold and invest for her.

After the death of Lillie Kate Fagin all of her heirs at law, except her father, Aaron W. Fagin, all being of age, by an instrument of writing of date July 16, 1884, agreed to and did transfer to Rachel G. Metcalfe, a sister of Lillie's, and one of the defendants in this suit, all their right, title, and interest in and to the estate of said Lillie, and by said instrument directed the defendant, Nathan Cole, as agent and trustee of said Lillie, to pay over to said Rachel Metcalfe any and all moneys of the deceased, and to transfer to her any and all

property of the deceased which he held for her, taking her receipt therefor.

This instrument was executed by all the heirs at law of Lillie, except her father, Aaron W. Fagin, but it was executed with his knowledge and consent and at his instance.

376 The defendant, Nathan Cole, acting under the authority of said instrument of writing, did, on or about September 23, 1884, transfer and deliver to said defendant, Rachel G. Metcalfe, all the notes, cash, bonds, and choses in action then in his possession as the agent or trustee for said Lillie.

On March 28, 1896, nearly twelve years after the death of said Lillie Kate Fagin and this distribution, William C. Richardson, the public administrator of the city of St. Louis, took out letters of administration upon the estate of Lillie Kate Fagin. As such administrator he instituted suit against the defendant Nathan Cole and the defendant Rachel G. Metcalfe, to recover from them the personal estate belonging at her death to Lillie Kate Fagin.

The defendants, besides pleading the statute of limitation of five years, set up in their separate answers the foregoing facts as a defense to plaintiff's petition. To this answer plaintiff demurred. This demurrer was overruled, and plaintiff refusing to plead further, judgment was entered for the defendants. Plaintiff appeals.

It may be conceded at the outset that the legal title to personal property of a deceased person is in the administrator who holds it in trust for heirs and legatees, and that he alone can sue for and recover the assets of such deceased person. But the mere legal title passes to the administrator; the equitable title descends to the heirs or legatees who are entitled to distribution. The defense interposed here is an equitable one, and sets up that there were no debts against the deceased, and that by agreement between those entitled to the property it had been transferred to one of their number, the defendant Rachel G. Metcalfe, and the effect of the demurrer is to admit these defenses to be true.

But plaintiff contends that the defenses pleaded afford **377** no barrier to the administrator's rights of recovery either at law or in equity. In support of this position Bartlett v. Hyde, 3 Mo. 490, Naylor v. Moffatt, 29 Mo. 126, Smith v. Denny, 37 Mo. 20, McPike v. McPike, 111 Mo. 216, 20 S. W. 12, and Green v. Tittman, 124 Mo. 372, 27 S. W. 391, are relied upon. But these decisions go no further than has already been con-

ceded, that is, that the administrator is, under ordinary circumstances, entitled to the possession of the personal property of the deceased, and that his right to sue for such possession is exclusive of all others. The law does not require the doing of a useless and unnecessary thing, and this would be the result in this case if plaintiff's position be sustained, and defendants compelled to pay him the value of the assets belonging to Lillie Kate Fagin, deceased, when no part of it is needed for the payment of debts, in order that he may in turn pay it back to the defendant Metcalfe, who owns the interest of all the other heirs.

In the case of *McCracken v. McCaslin*, 50 Mo. App. 85, Robert H. McCracken died intestate possessed of personal property and leaving several heirs who were of age, but no debts. The heirs made distribution among themselves of all the property.

Afterward, at the instance of one of the heirs, the probate court, after giving notice to those first entitled to administer, upon their refusal, ordered the public administrator to take charge of the estate. A motion was made by the plaintiffs in the probate court to set aside this order, for the reason that distribution had been made, and that there were no debts. The motion was overruled and upon appeal to the circuit court the motion was sustained and the administrator appealed.

It was held, when there are no creditors, and the heirs are of age, an administrator would be a mere naked trustee; and it would seem idle, as well as a waste of the estate, to go through ³⁷⁸ the form of administration against the will of the heirs, as evidenced by their settlement and distribution of the property among themselves, which all the parties would be estopped from disputing if the adjustment was made without fraud or imposition.

In *Walworth v. Abel*, 52 Pa. St. 370, it is said: "While the mere legal title passes to the administrator, the equitable descends upon the parties entitled to distribution. If there be no creditors, the heirs have a complete equity in the property, and if they chose, instead of taking letters of administration, to distribute it by arrangement made and executed among themselves, where is the principle which forbids it? The parties to such an arrangement, executed, would be forever equitably estopped from disturbing it, as amongst themselves, upon the most familiar principles of justice. . . . If there be no creditors in this case, the recovery of the value of the

cattle would be only for the purpose of distribution among the heirs, but this they have done themselves, by an appropriation of the value already, and thus is accomplished what cannot be done over again without breaking up the arrangement, and without manifest injustice to the defendant." To the same effect is *Weaver v. Roth*, 105 Pa. St. 408.

In the case of *Needham v. Gillett*, 39 Mich. 574, this language is used: "Where there are no creditors, and the heirs of age, an administrator would be a mere naked trustee, and it would seem idle, as well as a waste of the estate, to go through the form and expense of administration against the will of the heirs, as evidenced by their settlement and distribution of the property among themselves. When, under such circumstances, a settlement and domestic distribution is made without fraud or mistake, there is no necessity for administration."

So in *Woodhouse v. Pheps*, 51 Conn. 521, it was held ³⁷⁹ that while it is true, as a general proposition, that the title to personal property vests in an executor or administrator, yet he is a mere trustee for creditors and for heirs or legatees; and where the property is not wanted for the payment of debts, and is rightfully in the possession of the persons who have the equitable title to it, the naked title of the executor or administrator is not sufficient in equity against such equitable and rightful possession.

The same rule is announced in more emphatic terms, if possible, in the case of *Lewis v. Lyons*, 13 Ill. 117, in which it is held that an administrator has the legal title to the personal estate of his decedent, as trustee for the payment of debts, but after they are paid the residue of such estate belongs to the heirs; that a court of equity is not bound at all times to enforce a strict legal right, and will not require an heir to pay over money to an administrator when such administrator has no debt to pay, nor any use to make of it connected with the estate, merely that he may retain it for his own benefit, or be paid his costs and commissions.

In fact our attention has not been called to an authority to the contrary.

But plaintiff insists that the defense is simply a collateral attack upon the order and judgment of the probate court directing him as public administrator to take charge of the estate, which if true, the facts pleaded as such defense affords no defense to this action, for the validity of that order can-

not be questioned in this action: *Riley v. McCord*, 24 Mo. 265; *Naylor v. Moffatt*, 29 Mo. 126; *Green v. Tittman*, 124 Mo. 372, 27 S. W. 391. But we are unable to assent to this contention; upon the contrary, the question simply is as to the right of the administrator to the possession of property, to which he is only entitled for the payment of debts against the estate, and for distribution among the heirs ³⁸⁰ of deceased where there are no debts, and distribution of the property was made more than ten years before the institution of this suit among the heirs by common consent, who were of age and competent to do so. We know of no principle of law which forbids such a distribution by the heirs under such circumstances, and if it would not be a mockery of justice for a court of equity to require the defendants to pay over to plaintiff when there are no debts against the estate to pay, and no legitimate use for it in his capacity as administrator, merely for the purpose of allowing him to obtain it and use it, and then pay it back to them, less his costs and commissions, it is difficult to say what would.

For these considerations the demurrer to the answer was properly overruled, and as plaintiff declined to plead further, the judgment rendered for defendants thereon should be affirmed. It is so ordered.

Sherwood, P. J., and Gantt, J., concur.

AN ADMINISTRATOR'S RIGHT AND TITLE TO THE PERSONAL ESTATE of his decedent are discussed in the monographic note to *Fletcher v. American Trust etc. Co.*, 78 Am. St. Rep. 179-183.

LETTERS OF ADMINISTRATION WILL NOT BE GRANTED where there appears no necessity for them. Where the parties interested in an estate have settled their interests, the settlement renders administration unnecessary. And if there are no debts, the granting of letters may be prevented: See the monographic note to *Turk v. Turk*, 46 Am. Dec. 438. However, letters granted in such cases cannot be attacked collaterally: See the monographic note to *Dobler v. Strobel*, 81 Am. St. Rep. 555.

STATE v. MAGGARD.

[100 Mo. 469, 61 S. W. 184.]

LARCENY FROM DIFFERENT PERSONS IS ONE OFFENSE, WHEN.—If the stealing of different articles of property is at the same time and place, so that the transaction is the same, it is but one offense, although the property stolen may have belonged to different persons.

LARCENY FROM DIFFERENT PERSONS—DISTINCT OFFENSES.—If property stolen belongs to different persons, and is located at different places, as where some of it is in wagons in a wagon-yard, and other portions of it in a shed or stable loft near by, each asportation with intent to steal constitutes a different offense, although the thefts may all have been committed in rapid succession and in pursuance of a formed design to steal.

PETIT LARCENY—WHAT IS.—If property stolen from any one place, where there have been distinct larcenies from different persons, does not amount in value to as much as thirty dollars, the theft is petit larceny.

LARCENY—STANDARD OF VALUE—PROPER INSTRUCTION.—While the market value of goods stolen is, as a general rule, the standard of value, yet if there is no evidence that any of the articles described in an indictment for larceny had a marketable value, but all of the evidence is directed to their actual value, there is no error in telling the jury to be governed by what the evidence shows the property to have been actually worth.

Clark Dooley and Orchard & Saye, for the appellant.

Edward C. Crow, attorney general, and Sam B. Jeffries, assistant attorney general, for the state.

471 **BURGESS, J.** At the May term, 1900, of the circuit court of Texas county, the defendant, John W. Farrow, and Charles Smith were jointly indicted for grand larceny, which was alleged to have been committed on the 23d of March, 1900, in that county.

On the sixteenth day of July, 1900, being the May adjourned term of said court, on motion of defendants named in the indictment, a severance was granted, and on the eighteenth day of July next thereafter, the defendant, Maggard, having been put upon his trial, was convicted of grand larceny as charged, and his punishment fixed at two years' imprisonment in the penitentiary. From the judgment and sentence he appeals.

The property alleged to have been stolen consisted of overcoats, gloves, grain sacks, and various other goods and chat-

tels belonging to five different persons, to wit, E. E. Buck, Sidney Purcell, S. R. Townley, George Schoonover, Fred Brackett, and Henry Smith, all of whom lived in Texas county.

The day before the goods were stolen these persons went to Cabool, a station on the Kansas City, Fort Scott & Memphis Railroad in said county, for the purpose of getting some corn that was being shipped to them at that place. When they got there they drove into a lot, called by one of the witnesses a "wagon-yard," unhitched their teams, and remained until the following day, when they discovered that certain of their property had been stolen. Buck's property, or at least a part of it, to wit, a collar and bridle, and his sacks and corn, had been taken by him from his wagon and piled up in a shed. Purcell's property was in his wagon. Smith's in Keithley's shed loft in the wagon-yard, and the property of Brackett, Townsley and Schoonover in different places in the wagon-yard. When they discovered that their property had been stolen, a warrant was secured for the arrest of John W. ⁴⁷² Farrow and Charles Smith, who were followed a few miles in the country, overtaken, and the property found in their possession and taken from them, and they put under arrest. After the officer had placed them under arrest, and returned to Cabool with them, the defendant escaped, and was not apprehended again for several days thereafter, when he was found at Springfield, Missouri.

It is claimed by defendant that under the evidence he could only have been convicted of petit larceny, for the reason that the property of the different owners was located in different places at the time it was stolen, and each taking a separate and distinct offense, and as the value of the property taken from any one place did not amount in value to as much as thirty dollars he could not be convicted of grand larceny.

The stealing of different articles of property, belonging to different persons at different times, constitutes different offenses, but where the stealing of different articles of property is at the same time and place so that the transaction is the same, it is but one offense, although the property stolen may belong to different persons.

In *Lorton v. State*, 7 Mo. 55, 37 Am. Dec. 179, it is said: "The stealing of several articles of property, at the same time and place, undoubtedly constitutes but one offense against the laws, and the circumstance of several ownerships cannot increase or mitigate the nature of the offense": *Wilson v. State*, 45

Tex. 76, 23 Am. Rep. 602; *State v. Morphin*, 37 Mo. 373. The same rule is announced in *Nichols v. Commonwealth*, 78 Ky. 180.

But where property belongs to different persons, and is located at different places, as in the case at bar, each asportation with intent to steal constitutes a different offense, although the thefts may all have been committed in rapid succession, and in pursuance of a formed design to steal.

⁴⁷³ In this case it was impossible, in consequence of the different locations of the property, that it could all have been taken at the same time, and as the property stolen from any one place was not of the value of thirty dollars or more, there was no evidence authorizing an instruction for grand larceny.

Defendant asked the court to instruct the jury as follows: "9. The court instructs the jury that in arriving at the value of the property charged to have been stolen you are not to be governed by the value of the property to the owner, but you will be governed by what the evidence shows said property to have been actually worth on the open market."

The court refused the instruction as asked, struck out the words at the conclusion of the instruction, "on the open market," then gave it as amended over the objection and exception of defendant. It is insisted that the action of the court in this regard was error, and that the standard of value was not what the property was worth to its owners, but what it would have brought in open market.

As a general rule, the market value of goods stolen, or that for which similar goods are, at the time and place of the theft, commonly in the markets bought and sold, is the standard of value. But where things stolen have no marketable value—for instance, a second-hand coffin (*State v. Doepke*, 68 Mo. 208, 30 Am. Rep. 785), or second-hand clothing (*Pratt v. State*, 35 Ohio St. 514, 35 Am. Rep. 617; *Printz v. People*, 42 Mich. 144, 36 Am. Rep. 437, 3 N. W. 306), or brood sows (*State v. Walker*, 119 Mo. 467, 24 S. W. 1011), the owner may testify to the actual value of the property regardless of any market value for it. In the case at bar there was no evidence that any of the articles described in the indictment had a marketable value, but all of the evidence was directed to their actual value, hence no error was committed in amending the instruction and in giving it as amended: *State v. Walker*, 119 Mo. 467, 24 S. W. 1011. There was no evidence to authorize it.

474 The indictment is in the usual form, and free from substantial objection. For the error of the court indicated the judgment is reversed and the cause remanded.

Sherwood, P. J., and Gantt, J., concur.

LARCENY.—THE THEFT OF SEVERAL ARTICLES at one and the same time and place constitutes but one crime, though they belong to different owners. It is otherwise if the theft is at different and distinct times and places on the same expedition, from the same or different owners: *State v. Emery*, 68 Vt. 109, 54 Am. St. Rep. 878, 34 Atl. 432.

LARCENY.—THE MARKET VALUE of an article stolen, and not its original cost, is the test by which to determine the grade of the larceny: *Burrows v. State*, 137 Ind. 474, 45 Am. St. Rep. 210, 37 N. E. 271; *State v. Doepke*, 68 Mo. 208, 30 Am. Rep. 785. But in *Printz v. People*, 42 Mich. 144, 36 Am. Rep. 437, 3 N. W. 306, it is held that the owner may testify as to the value of a seal-skin cloak that she has worn, having priced similar articles.

STATE v. LAYTON.

[160 Mo. 474, 61 S. W. 171.]

CONSTITUTIONAL LAW—PURE FOOD LAWS.—The legislature has no constitutional right to absolutely prohibit a person from selling, or offering for sale, an article for food or drink, if it is one so universally conceded to be wholesome and innocuous that the court may take judicial notice of it; but it does have a right to either regulate or prohibit such sale, if there is a dispute as to the fact of the article's wholesomeness for food or drink.

CONSTITUTIONAL LAW—PROHIBITING USE OF ALUM IN BREAD.—When there is a sharp conflict of testimony as to the noxious or innocuous character of alum baking-powders, a court cannot take judicial notice that these powders are a perfectly innocuous preparation, and cannot, therefore, declare that the legislature, in prohibiting the use of alum in bread, transcended its constitutional authority.

STATUTES — UNCONSTITUTIONALITY OF — QUESTION OF FACT.—A statute is not to be declared void, on the ground of unconstitutionality, unless the violation of the constitution is so manifest as to leave no room for reasonable doubt. Its constitutionality cannot be made to depend upon a question of fact.

STATUTES—ACT PROHIBITING THE USE OF ALUM IN ARTICLES OF FOOD OR DRINK—WHEN CONSTITUTIONAL.—An act, making it unlawful to manufacture, sell, or offer to sell, any article, compound, or preparation for the purpose of being used, or which is intended to be used, in the preparation of food, in which article, compound, or preparation "there is any arsenic, calomel, bismuth, ammonia, or alum," is not unconstitutional, though the act is obviously aimed at what is known as "alum baking-powders,"

where there is such a sharp conflict of testimony as to their wholesomeness or unhealthfulness that a court cannot take judicial notice that they are unwholesome or unhealthful.

Seddon & Blair and Stanley Stoner, for the appellant.

Edward C. Crow, attorney general, Sam B. Jeffries, assistant attorney general, and Stewart, Cunningham & Eliot, for the state.

⁴⁸¹ GANTT, J. On the thirtieth day of August, 1899, the assistant prosecuting attorney of the St. Louis court of criminal correction lodged in that court the following information against Whitney Layton of said city: "Richard Johnston, assistant prosecuting attorney, of ⁴⁸² the St. Louis court of criminal correction, now here in court, on behalf of the state of Missouri, information makes as follows: That Whitney Layton in the city of St. Louis, on the twenty-eighth day of August, 1899, then and there doing business in this state, did unlawfully manufacture, sell and offer to sell a certain compound and preparation, to wit, Layton's Health Food Baking Powder, which said compound and preparation was so manufactured and sold for the purpose of being used and was intended by said Layton to be used in the preparation of food, in which said compound and preparation, so manufactured and sold, there was alum. Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state," etc. The defendant was arrested and entered his plea of not guilty. A jury was waived and the cause tried to the court.

At the trial the state's representative filed and read in evidence the following stipulation: "For the purpose only of the trial of this cause, and at said trial the defendant Whitney Layton, for a stipulation covering a part of the facts in the above-entitled case, admits that in the city of St. Louis, Missouri, on the twenty-eighth day of August, 1899, he, the defendant, then and there doing business in the state of Missouri, did manufacture, sell, and offer to sell to J. M. Houston Grocery Company, then doing business at said city, a certain compound and preparation, to wit, one case containing two dozen one-pound cans of baking-powder, known and designated as Layton's Health Food Baking Powder, which said compound and preparation, so manufactured, sold, and offered for sale by him for the purpose of its being used and was intended by defendant

and by said J. M. Houston Grocery Company to be used in the preparation of food. ⁴⁸³ Defendant further admits that in said compound and preparation so manufactured, sold, and offered to be sold by him there was alum, and that the fact that the same contained alum was then well known to defendant; and it is further agreed and stipulated that at the trial of this case either party may offer any other evidence not inconsistent with the above facts which he may deem material, relevant, and competent in the case, subject to objection by the other party to its materiality, relevancy or competency." The prosecution then rested.

The defendant then offered evidence tending to establish the following facts: Baking-powders have been in use for more than fifty years. They are intended to furnish to the people a simple, cheap, efficient, and wholesome leavening agent in the cooking of food, as a substitute for yeast, which is a very slow and more expensive leavening agent, and one which requires considerable intelligence in the cook to use successfully. All baking-powders furnish this leavening agent in the form of carbon dioxide (carbonic acid gas), which is given off from the baking-powder in preparing and cooking food. This gas, being liberated in the dough, forms bubbles which take permanent form in the baked bread, thus making it light and porous. All baking-powders in their essential features are the same. They all supply this leavening agent (dioxide of carbon) by freeing it from bicarbonate of soda. They differ in the nonessential manner in which this carbon dioxide is released from the bicarbonate of soda. There are three classes of baking-powders known to commerce, viz., the cream of tartar baking-powders, the phosphate baking-powders, and the alum baking-powders.

The cream of tartar powders are composed of bicarbonate of soda and cream of tartar (bicarbonate of potassium), mixed ⁴⁸⁴ with starch as a filler. The soda and cream of tartar are combined in such proportions that when they are united together in the presence of water, in the process of cooking, they react upon each other, and free the carbon dioxide which leavens the bread. The resulting product left in the bread after cooking is Rochelle salts, a purgative agent.

In the phosphate powders the active agent is the phosphate of calcium, which unites with the bicarbonate of soda and liberates the dioxide of carbon, the leavening agent.

The alum powders, as they do not differ from the cream of tartar powders in the main essential features of a baking-powder, to wit, the liberation of the carbon dioxide from bicarbonate of sodium, but merely in the nonessential mode of liberating the gas, do not differ from each other essentially. In the phosphate alum powders, phosphate of calcium is used to aid in liberating from the bicarbonate of soda the gas, the leavening agent, the essential thing.

The straight alum baking-powders are composed of bicarbonate of soda and a double sulphate salt of sodium and aluminum, which technically is not alum at all but is popularly called soda alum, with starch as a filler or carrier. The alum and the bicarbonate of soda are mixed in such proportions that in the cooking process the carbon dioxide is released as a leavening agent, as in the case of the cream of tartar baking-powders. The resulting products are sulphate of sodium and hydroxide (hydrate) of aluminum.

The evidence of defendant tended to show that none of the products left in the food cooked with alum baking-powders are at all injurious to the human system.

The evidence shows that the trade in alum baking-powders as a trade has given entire satisfaction to the people. Alum baking-powders are nearly as standard an article as flour or sugar. They are to be found upon the shelves of every grocery ⁴⁸⁵ store, not only in Missouri but in the United States. They were first introduced about 1870. In spite of the fiercest competition and most hostile rivalry upon the part of manufacturers of cream of tartar powders, who the evidence shows have used every effort to prejudice the mind of the public by every manner of advertisements and representations, the trade rapidly expanded until it has now reached vast proportions. The evidence tended to show that alum baking-powder sold in the United States last year amounted to not fewer than one hundred and twenty million pounds and involved an enormous expenditure in its manufacture and distribution. The defendant's evidence also tended to show that not only was the particular case of baking-powder known as "Layton's Health Food," for the sale of which he was prosecuted, but also all alum baking-powders in general are, and always have been, healthful and wholesome adjuncts in the preparation of human food. The evidence tends to show that no one had ever either heard of, or had known of, a single case where the health of a single human being had been injured, or had been supposed to have been

injured, by the use of alum baking-powder in the preparation of food, and that the trade in alum baking-powders, as a trade, prior to the passage of this law, was an honest and lawful business in a generally harmless and useful preparation used as an adjunct in the cooking of food. The manufacturers and sellers of both such powders, cream of tartar and alum, have been engaged in competition with each other in furnishing to the people from bicarbonate of soda a leavening agent for cooking bread, cake, etc. They differ only in the nonessential manner of freeing the gas. That the trade in cream of tartar powders has been practically monopolized by the Royal Baking Powder Company, which controls the cream of tartar market.

To all of this evidence counsel for the state objected ⁴⁸⁶ when it was offered, on the ground that in view of the stipulation made between the parties, which was read by the state in making its case, all evidence which might be offered by the defendant in his defense would be irrelevant and immaterial.

The court, at the time of the objection, announced it would not then rule upon the objection, but would hear the evidence subject to such objection and would at the end of the case announce its ruling, and, if it concluded the objection was well taken, would rule out all of such evidence.

On the other hand, the state, in rebuttal, offered much evidence by distinguished chemists and physicians that alum in the quantities usually used in the preparation of baking-powders was and is injurious to health; that while it assists in liberating the carbonic acid gas and thus makes the bread light, there is a residuum of alumina left in the bread which is solvable and enters into the system and acts as an astringent and is deleterious; that there was a general prejudice in the minds of the public against alum powders; that while the sale of alum powders was very enormous people generally were not advised that they were purchasing alum powders.

After all the evidence was in, the court sustained the objection of the state and excluded all defendant's evidence as irrelevant and immaterial to the issue in the case. To which the defendant duly excepted at the time.

Every item of the evidence offered by defendant was avowedly introduced for the purpose of showing that the statute under which defendant was prosecuted was unconstitutional and void, which contention the court overruled, and found

defendant guilty. The statute which defendant is charged to have violated is the act of May 11, 1899, and is as follows:

"An Act to Prevent the Use of Unhealthy Chemicals or Substances in the Preparation or Manufacture of any Article Used or to be Used in the Preparation of Food.

487 "Be it enacted by the General Assembly of the State of Missouri as follows:

"Section 1. That it shall be unlawful for any person or corporation doing business in this state to manufacture, sell, or offer to sell, any article, compound, or preparation, for the purpose of being used, or which is intended to be used, in the preparation of food, in which article, compound, or preparation there is any arsenic, calomel, bismuth, ammonia, or alum.

"Sec. 2. Any person or corporation violating the provisions of this act shall be deemed guilty of a misdemeanor and shall, upon conviction, be fined not less than one hundred dollars, which shall be paid into and become a part of the road fund of the county in which such fine is collected.

"Approved May 11, 1899."

The defendant asked various declarations of law to the effect that the legislature could not arbitrarily declare his business unlawful, which were refused and he saved his exceptions, and in due time filed his motions for new trial and in arrest, which were likewise overruled.

As already indicated in the statement of the case, the one great question upon this record is the constitutionality of the act of May 11, 1899, making it a misdemeanor in this state "for any person or corporation doing business in this state to manufacture, sell, or offer to sell any article, compound, or preparation for the purpose of being used, or which is intended to be used, in the preparation of food, in which article, compound or preparation there is any alum."

The act was obviously aimed at what is known as "alum baking-powders." While the act also condemns the use of arsenic, calomel, bismuth, and ammonia in baking-powders, there is not the slightest evidence that either of these poisons or substances is ever used in the preparation of baking-powders in the ordinary trade by reputable dealers and merchants, 488 where the evidence which the court heard, but finally excluded in making up its verdict and judgment, disclosed that alum is and has been for more than a quarter of a century an ingredient in the preparation of baking-powders; that baking-

powders containing alum in some degree are used to an enormous extent; that not less than one hundred and twenty million pounds of such powders have been sold in the United States in the year next preceding the filing of the information in this case.

The defendant is a manufacturer of a baking-powder known as "Layton's Health Food Baking Powder," and after the act of May 11, 1899, if valid, went into effect, sold a case of said baking-powder in the city of St. Louis.

The constitutionality of the act is assailed on two grounds: 1. That it violates section 28, article 4 of the constitution of Missouri; 2. That it conflicts with sections 4 and 30 of article 2 of the constitution of Missouri.

It is a trite saying that when the courts are called upon to decide that an act of the legislature violates the organic law they start with every presumption in favor of the validity of the statute. This much we owe to a co-ordinate branch of the government, upon which the people in the constitution have conferred the law-making power.

The right and power of the courts under our peculiar form of government to declare a solemn and formal act of the legislature invalid arises not out of any supposed or assumed superiority of the judicial department over that of the legislative branch of the government, but is founded upon the fact that the constitution is the organic law which defines the limitations of all branches of the government and is the supreme law by which the acts of all branches of the government must be tested, and in the very nature of things the judiciary must, in performing its functions, determine whether the legislative enactment is in harmony with the supreme law.

489 Proceeding a step farther, it must be conceded that the validity of the act in question must be referable to what we denominate the police power of the state, and that the legislature is clearly the department of the government which is authorized to exercise the police power.

Under forms of government where limitations upon executive and legislative powers do not exist, there is no restriction upon this necessary function of government, but under our federal and state governments limitations are to be found in our written constitutions.

Said the supreme court of the United States in *Mugler v. Kansas*, 123 U. S. 661, 8 Sup. Ct. Rep. 297: "It does not follow that every statute enacted ostensibly for the promotion of these

ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute (Sinking Fund Cases, 99 U. S. 700-718), the courts must obey the constitution rather than the law-making department of the government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To what purpose,' it was said in *Marbury v. Madison*, 1 Cranch, 137-176, 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has⁴⁹⁰ transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."

Accepting this statement of the rights and duties of the respective departments, we are brought to the contention of the parties to this record.

The defendant insists that the compound prepared by himself and other manufacturers as and for a baking-powder is a perfectly healthful article, that had been in general, indeed universal, use in this state and throughout the United States for thirty years. That these so-called alum baking-powders have proven acceptable as a common household article, as a most useful adjunct to the cooking process; that during all that time not a single instance had occurred in which a single person had been rendered sick or suffered in health from their use; that they had become so acceptable to the bakers and housewives of the land that their production and sale amounted to one hundred and twenty million pounds in a single year; that no more objection could be urged against their use as being

deleterious than can be and has been urged by vegetarians against the use of meat, or by certain persons against the common table salt or the use of wheat bread, and that it is no more liable to adulteration than flour or sugar. He urges that to strike down this great industry in view of its recognized harmlessness is an arbitrary and unwarranted attempt to exercise the police power of the legislature.

On the other hand, the state insists that section 4 of our bill of rights which provides "that all constitutional government is intended to promote the general welfare of the people; ⁴⁹¹ that all persons have a natural right to life, liberty, and the enjoyment of the gains of their own industry; that to give security to these things is the principal office of government, and that when government does not confer this security it fails of its chief design," and section 30 of the bill of rights which ordains "that no person shall be deprived of life, liberty, or property, without due process of law," are not infringed by this act; that "the constitution does not guarantee or give to any person the right to manufacture or sell any chemical or substance which the legislature has declared to be unhealthy and has forbidden." The state's counsel further insists that the judgment of the criminal court is in conformity with the decision of this court in *State v. Addington*, 77 Mo. 110, which case they insist involved every essential feature of the case at bar.

In *State v. Addington*, 77 Mo. 110, the defendant was prosecuted under the statute of this state of March 24, 1881, entitled, "An act to prevent the manufacture and sale of oleaginous substances, or compounds of the same, in imitation of the pure dairy products."

In sustaining that statute, this court stated concisely the ground upon which it rests, as follows: "The central idea of the statute before us seems very manifest; it was, in our opinion, the prevention of facilities for selling or manufacturing a spurious article of butter, resembling the genuine article so closely in its external appearance as to render it easy to deceive purchasers into buying that which they would not buy but for the deception. The history of legislation on this subject, as well as the phraseology of the act itself, very strongly tend to confirm this view. If this was the purpose of that enactment, we discover nothing in its provisions which enables us to say that the legislature exceeded the power confided to that department of the government; ⁴⁹² and unless

we can say this, we cannot hold the act as being anything less than valid."

Commenting upon this decision Tiedeman, in his work on "Limitations of Police Power," page 296, says: "But the only valid objection to its sale is the close resemblance to genuine butter, and the consequent opportunity for the perpetration of fraud. And this was the sole ground upon which the constitutionality of the law was sustained by the supreme court of Missouri."

In *State v. Bockstruck*, 136 Mo. 356, 38 S. W. 317, *State v. Addington*, 77 Mo. 110, was reviewed by the same judge who wrote the opinion in that case, and as confirming the view taken of that case by Tiedeman, we quote: "We consider that the state has the same right to forbid and punish the manufacture of counterfeit butter that it has to forbid and punish the manufacture of counterfeit coin. The like view was taken by us of the validity of the act of 1881, in relation to the manufacture or sale of imitation butter (*State v. Addington*, 77 Mo. 110), though the latter act contained no such provisions as are contained in section 8 of the present act."

It will be observed that the court dwells in both cases upon the fact that in both acts "the evident object and dominating idea was to prevent the manufacture or sale of a spurious article of butter," and upon this ground we still have no hesitancy in holding that such legislation is clearly valid.

Such, also, was the ruling in *People v. Arensberg*, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277, in which the act was entitled, "An act to prevent deception in the sale of dairy products," and it was forbidden to sell any article "in imitation or semblance or designed to take the place of natural butter."

In *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29, the court of appeals held an act of the legislature invalid which made the manufacture out of any oleaginous substance or compound other ⁴⁹³ than that produced from unadulterated milk and cream, any article designed to take the place of butter, etc. Judge Rapallo, in the course of the opinion, after stating that the evidence disclosed that oleomargarine was a perfectly healthful and pure article of food, says: "One of the learned judges who delivered opinions at the general term endeavored to sustain the act on the ground that it was intended to prohibit the sale of any artificial compound, as genuine butter or cheese made from unadulterated milk or cream. That it was the design to deceive which the law rendered criminal. If

that were a correct interpretation of the act, we should concur with the learned judge in his conclusion as to its validity, but we could not concur in his further view that such an offense was charged in the indictment, or proved on the trial. The prohibition is not of the manufacture or sale of an article designed as an imitation of dairy butter or cheese, or intended to be passed off as such, but of an article designed to take the place of dairy butter or cheese. Simulation of butter is not the act prohibited."

Again the court says: "It appears to us quite clear that the object and effect of the enactment were not to supplement existing provisions against fraud and deception by means of imitations of dairy butter, but to take a further and bolder step, and by absolutely prohibiting the manufacture or sale of any article which could be used as a substitute for it, however openly and fairly the character of the substitute might be avowed and published, to drive the substituted article from the market, and protect those engaged in the manufacture of dairy products against the competition of cheaper substances, capable of being applied to the same uses, as articles of food." The court then asks the question, "Who will have the temerity to say that these constitutional principles are not violated by an enactment which absolutely prohibits an important branch ⁴⁹⁴ of industry for the sole reason that it competes with another, and may reduce the price of an article of food for the human race?" The court held that statute unconstitutional.

Judge Dillon, in his admirable work on Municipal Corporations, fourth edition, section 141, page 211, in a note to the text says: "We cannot refrain from expressing our full concurrence in the views and conclusions of the court of appeals of New York in *People v. Marx*. . . . The Pennsylvania act of 1885, under which Powell was convicted (*Powell v. Commonwealth*, 114 Pa. St. 265, 60 Am. Rep. 350, 7 Atl. 913, and affirmed in *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 1257), makes the manufacture and sale of oleomargarine, though open and unconcealed, a crime. We cannot but express our regret that the constitution of any of the states or that of the United States admits of a construction that it is competent for a state legislature to suppress (instead of regulating), under fine and imprisonment, the business of manufacturing and selling a harmless and even wholesome article, if the legislature chooses to affirm, contrary to the fact, that the public health or public policy requires such suppression. The record of

the conviction of Powell for selling, without any deception, a healthful and nutritious article of food makes one's blood tingle."

At first blush the decisions in the Marx and Addington cases may appear to collide, but upon a closer view it will be seen that the court of appeals distinctly assents to the doctrine upon which Judge Sherwood announces the Addington case rests; for, speaking of the effort to sustain the New York statute on the ground "that it was intended to prohibit the sale of any artificial compound as genuine butter or cheese made from unadulterated milk or cream, that it was that design to deceive which the law rendered criminal," Judge Rapallo says: "If that were a correct interpretation of the act, we should concur as to its validity."

495 As the oleomargarine act considered in the Addington case prohibited imitation butter, and as this court held it was valid because it shut the door against the designs to perpetrate fraud, the great underlying principle of both cases was the same, though the two courts might differ as to the meaning of the words of the two acts.

Does the act of May 11th, making it penal to use alum in the preparation of baking-powders, bring it within the reason of *State v. Addington*, 77 Mo. 110? In the Addington case there was a recognized standard for the article which the legislature intended to protect against fraudulent imitation, to wit, natural butter made from pure dairy products or unadulterated milk, and in accordance with our decision in that case we held that statutes enacted to prevent the imposition of a deception upon others are clearly valid: *Cook v. State*, 110 Ala. 40, 20 South. 360; *Stolz v. Thompson*, 44 Minn. 271, 46 N. W. 410; *State v. Marshall*, 64 N. H. 549, 15 Atl. 210; *State v. Newton*, 50 N. J. L. 534, 14 Atl. 604; *Commonwealth v. Huntley*, 156 Mass. 236, 30 N. E. 1127; *State v. Horgan*, 55 Minn. 183, 56 N. W. 688.

But the question raised on this record, while a kindred one, is, we conceive, different. It seems to us that in the nature of things there is a wide difference between legislation prohibiting or regulating the manufacture and sale of an article which is manufactured with a design to imitate a standard or superior article, and pass it off on the public, which cannot readily detect the imposition, for something different from what it is, and the manufacture and sale of an article which in truth and fact is admitted to be innocuous and health-

ful, and in general use, and about which there is neither secrecy or imitation of another article of conceded purity and wholesomeness.

The Addington and similar cases settle the constitutionality of the former, but do not reach the latter. As the case ⁴⁹⁶ at bar does not fall within the reasoning and purview of the Addington case, that case does not reach the difficulty here. The statute upon which this prosecution is based is not based upon the idea of imitation of one article by another.

No baking-powder is recognized as the standard, as is butter from unadulterated milk in the oleomargarine statute. Here the statute must be upheld, if at all, upon the right of the legislature to make all needful laws to preserve the public health.

The right of the state to protect the health, morals, and safety of its people by regulations that do not interfere with the execution of the powers of the general government or violate rights secured by the constitution of the United States is now recognized by all courts in this country.

It is peculiarly a legislative function. While it is true that there are limits under our system to this power, we must start with the presumption in favor of the act. While we do not accede to the proposition that the legislature can arbitrarily declare any article of food in general use, and concededly wholesome and innocuous, to be unhealthy, and its production and sale a crime, and would have no hesitancy in declaring such an act void, when the act on its face disclosed its arbitrary and unreasonable character, or where, as in *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29, when such an act is challenged on such ground it is admitted by the state that the prohibited article is innocuous and beneficial in itself, and is not made in imitation of or with a view to deceive the public, but is made and vended without secrecy and without imitation of any other, and the only purpose of the law is to prevent competition, still, we find ourselves confronted in this case with a state of facts essentially different from that presented to the court in the Marx case.

While defendant offered much evidence to show that ⁴⁹⁷ alum baking-powders were a useful and harmless preparation, there is no gainsaying the fact that the state offered much pertinent testimony of the contrary. That there has long existed a strong prejudice against the use of alum in the making

of bread must be conceded. Whether or not the prejudice is well founded is another matter.

As early as the thirty-seventh year of the reign of George III, the British parliament absolutely prohibited the use of alum in the making of bread: Stats. 37 George III, c. 98, sec. 21. And irrespective of the statute it was held indictable to use it in large quantities: *Rex v. Dixon*, 4 Camp. 12. Such seems still to be the statute law of England: Bread Act, 1836; 1 Chitty's Eng. Stats., tit. "Bread" and "Adulteration of Foods."

Several states of our Union, while not going to the extreme of our general assembly, have statutes passed with a view to the protection of the public against these alum powders by requiring that the cans in which they are sold shall give notice that they contain alum, and these facts have been sustained as fairly within the police power of the state. This court, in view of this sharp conflict of testimony as to the noxious or innocuous character of alum baking-powders, cannot take judicial notice that these powders are a perfectly innocuous preparation.

Under these circumstances, then, are we to hold that the court of criminal correction erred in not passing upon the question of fact tendered to him and having found the fact, in not deciding the law constitutional or unconstitutional accordingly as it appeared to him to be harmful and deleterious or harmless and innocuous? "If so," as was said in *People v. Cipperly*, 101 N. Y. 634, 4 N. E. 107, affirming 37 Hun, 324, by the court of appeals of New York, the same court which decided *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29, "the court must ⁴⁹⁸ charge the jury, in each case, that if they find milk below that standard to be unwholesome, then the statute is constitutional; if they find it to be wholesome, then the statute is unconstitutional. Evidently a constitutional question cannot be settled, or rather unsettled, in that way. The constitutionality would vary with the varying judgments of juries." Substitute alum baking-powders for milk and we have the rule applicable to this case.

Long before the decision of the court of appeals in that case, however, Judge Leonard of this court, in *State v. Rich*, 20 Mo. 396, had said: "If, whenever any act done under the authority of the law came in question collaterally, the constitutionality of the law could be contested, then the trial of the main issue must necessarily be delayed until the preliminary fact, upon which the validity of the contested legislative act

depended, should be first tried and determined upon testimony, which, being different in different cases, might involve the absurdity of deciding the law constitutional one day and unconstitutional the next." And he held the evidence inadmissible.

What, then, is the test when the constitutionality of an act of the legislature is assailed as invading the right of the citizen to use his faculties in the production of an article for sale for food or drink? We answer that if it be an article so universally conceded to be wholesome and innocuous that the court may take judicial notice of it, the legislature, under the constitution, has no right to absolutely prohibit it; but if there is a dispute as to the fact of its wholesomeness for food or drink, then the legislature can either regulate or prohibit it. The constitutionality of the law is not to be determined upon the question of fact in each case, but the courts determine for themselves upon the fundamental principles of our constitution, which vests the legislative power in the general ⁴⁹⁹ assembly, and the rule of construction adopted by our courts "that an act of the legislature is not to be declared void, unless the violation of the constitution is so manifest as to leave no room for reasonable doubt": *Commonwealth v. Smith*, 4 Binn. 117; *Cooley's Constitutional Limitations*, 6th ed., 216; *State v. Nelson*, 52 Ohio St. 88, 39 N. E. 22.

The cases abound, in the greatest courts, state and federal, in which this limitation has been set upon their own authority by the greatest judges who have illumined our jurisprudence: *Ogden v. Saunders*, 12 Wheat. 213; *Sinking Fund Cases*, 99 U. S. 700; *In re Wellington*, 16 Pick. 87, 26 Am. Dec. 631; *Perry v. Keene*, 56 N. H. 514.

In this last case Ladd, J., said: "Certainly, it is not for this court to shrink from the discharge of a constitutional duty; but, at the same time, it is not for this branch of the government to set an example of encroachment upon the province of the others. It is only the enunciation of a rule that is now elementary in the American states to say that before we can declare this law unconstitutional we must be fully satisfied—satisfied beyond a reasonable doubt—that the purpose for which the tax is authorized is private and not public."

Keeping in view this cardinal principle for our guidance, how can we say, in view of the contradictory evidence as to the effect on the health of bread made with alum baking-powders,

that the legislature, beyond a reasonable doubt, transcended its constitutional right in prohibiting the use of alum in bread? We are not authorized to do so.

It may be argued with great force that a statute similar to the Minnesota statute would be sufficient for the protection of purchasers who have a prejudice against these powders; it may be that in the small quantities now used in these alum powders generally it cannot be shown that any particular person has ever lost his health from their use, but that the ⁵⁰⁰ legislature deemed their use deleterious cannot be denied, and there is no such conclusive evidence to the contrary as to justify this court in holding that this act, intended for the benefit of the public health, is void. The mere wisdom or unwisdom of the act is not for us to decide.

The judgment must be and is affirmed.

Sherwood, P. J., and Burgess, J., concur.

THE CONSTITUTIONALITY OF PURE FOOD LAWS is discussed in the monographic note to *Booth v. People*, 78 Am. St. Rep. 261, 262. A statute requiring makers and sellers of baking-powder to affix a label to every can, containing the words: "This baking powder is composed of the following ingredients, and none other," naming them, is valid: *State v. Sherod*, 80 Minn. 446, 81 Am. St. Rep. 268, 83 N. W. 417.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

HENNEY BUGGY COMPANY v. ASHENFELTER.

[60 Neb. 1, 82 N. W. 118.]

FRAUDULENT CONVEYANCES — PREFERENCES.—If a debtor in failing circumstances conveys the whole of his goods to a creditor, who pays him the difference between the amount of the debt and the fair value of the goods in cash, with knowledge or notice of such facts as would induce an ordinarily prudent person to make inquiry which would lead to knowledge that such debtor is attempting to defraud his other creditors by such sale, or to hinder and delay them in the collection of their debts, the conveyance is void as to such creditors.

F. I. Foss, B. V. Kohout, and N. Jackson, for the appellant.
W. C. Le Hane and D. E. Collins, for the appellee.

2 NORVAL, C. J. In 1893 one George R. Fouke was engaged in various lines of business in Liberty, Gage county, this state. In that year he failed, his liabilities being far in excess of his assets. He sold practically all of his personal property to the Henney Buggy Company, one of his creditors, the consideration for such sale being the cancellation of his debt to it, amounting to over eighteen hundred dollars, and the payment to him by it of the difference between the amount of such debt and the agreed value of the property, such difference being three hundred dollars. Fouke was then placed in possession of said property, consisting of stocks of goods of different character, as an employé of the company, and a former employé of his was appointed its general agent in the management and disposition of the same. After this sale, some of the other creditors of Fouke attached a portion of said goods; others obtained judgments against him, and levied executions upon the

goods, the value of the goods so levied on being, according to the agreement of the parties hereto, one thousand dollars. The goods so levied on were, while in the hands of the officer holding such writs, replevied by said Henney Buggy Company, it claiming title to them by virtue of said sale to it by Fouke. The defendant officer answered, setting up the fact that he held said goods by virtue of levies under said writs, and that the sale by Fouke to the buggy company was fraudulent and void as to the other creditors of Fouke. On this issue the case was tried in the lower court, resulting in a verdict and judgment in favor of the defendant officer, and said buggy company comes to this court by petition in error from such judgment.

There are over one hundred and fifty errors assigned in the petition in error, not all of them, however, being urged in the brief of counsel. We shall notice such errors as are urged in the brief, so far as they may affect this decision, it being understood that others not noticed would not in any wise alter the conclusions arrived at by the court.

³ It will be observed that in the sale of this property by Fouke to the Henney Buggy Company a greater amount of goods was sold than sufficed to satisfy the debt of Fouke to it, the difference being paid by it to Fouke in cash. It is a well-established principle of law that a debtor may prefer a creditor, and that such preference is not fraudulent, even though such creditor has knowledge of an intent on the part of such debtor to hinder, delay or defraud his other creditors, so long as such creditor takes only sufficient goods to satisfy the debt, or the value of which is not appreciably greater than the amount of such debt, and does not participate in such fraudulent intent. But does a different rule obtain when, in a case like this, the creditor takes more goods than are sufficient to liquidate the debt, paying the difference between their value and the debt in cash? We are of the opinion that another rule does apply, that a creditor who purchases the whole of his debtor's goods—said debtor being in failing circumstances—paying the difference between the amount of the debt and the fair value of the goods in cash, occupies the same position as would a purchaser not a creditor; and that if such purchasing creditor knows, or has such knowledge as would induce an ordinarily prudent person to inquire into facts which would lead to knowledge that such debtor is attempting to defraud his other creditors by such sale, or to hinder and delay them in the collection of their debts, such a sale is void as to such creditors. Such was the

holding of this court in the case of *Switz v. Bruce*, 16 Neb. 463, 20 N. W. 639; and it seems to us that it is consonant with sound reason. It should be remembered that the rule that permits failing debtors to prefer creditors is not a general rule in itself, but is an exception to a more general rule, which is, that where a debtor in failing circumstances sells his goods with the intent to hinder, delay, or defraud his creditors, and the purchaser has knowledge thereof, or is advised of sufficient facts to put a person of ordinary prudence upon inquiry which would ⁴ lead to such knowledge, such sale is fraudulent and void, whether such purchaser participates in such fraudulent intent or not. An examination of the record in this case discloses the fact that the Henney Buggy Company, through its agents, at the time the so-called sale was made to it by Fouke, had knowledge that such sale by him to it would inevitably have the effect to hinder and delay his other creditors in the collection of their debts, and that such sale to it, resulting in the cancellation of his debt to it, would prevent other of his creditors from collecting their debts, and would thus deprive them of their rights; hence we must conclude that on the undisputed facts, in fact upon evidence brought out by said plaintiff itself, such sale was fraudulent and void as to his other creditors.

It is claimed by plaintiff that this case falls within the rule of *Sunday Creek Coal Co. v. Burnham*, 52 Neb. 364, 72 N. W. 487. In that case the creditor had taken from the debtor, in full satisfaction of his debt, property of a value not materially or appreciably greater than the amount of the debt, and this court decided that, under such state of facts, the validity of the sale was not affected by the existence of knowledge on the part of such creditor of an intent on the part of the debtor to defraud his other creditors, provided such creditor did not participate in such intent. This is doubtless the rule, or rather an exception to the general rule, as hereinbefore stated. But a different principle applies where the creditor not only receives from the debtor goods equal to the amount of the debt, but goes further and voluntarily takes an amount of property greater in value than suffices to satisfy the debt, paying to such debtor the difference in money, at the same time having knowledge, or being in position to obtain knowledge, that such transaction would result in a fraud upon the other creditors. To the extent of the payment of the difference between the debt and the value of the goods, such creditor becomes a vol-

untary purchaser, and must be governed by the rule of ⁵ law applicable to such. If a part of such transaction is tainted with fraud, and is indivisible from the remainder (which is the case here), the whole transaction is tainted with fraud.

Numerous exceptions are taken to instructions given by the court below. Such objections are principally to those which announce a rule not materially differing from that hereinbefore stated, and we think that in none of them was any error perpetrated. To other instructions objections are urged that they are not sufficiently specific. If the instructions were open to these objections, counsel had ample opportunity to obviate such defects by proffering instructions which he may have deemed more definite, but as he failed so to do, such objections must be deemed to have been waived.

There are also numerous objections urged to questions propounded to said Fouke on his cross-examination, he having been called as a witness on behalf of plaintiff. Such objections are mainly to a class of questions asked him relative to the value of the property sold by him to said buggy company. Such questions took a wide range; but much latitude is permissible when a party to an alleged fraudulent transaction is upon the stand, and is being cross-examined by the opposite party. Further, as the sale by Fouke to the buggy company was, on the undisputed facts, fraudulent as to his other creditors, and therefore void, we fail to see how the evidence adduced could injuriously affect the plaintiff; hence, we are of opinion that no error could have accrued to it on the introduction of this testimony.

A careful examination of the record in the other respects complained of by plaintiff convinces the court that no prejudicial error occurred on the trial, for which reason the judgment of the lower court is affirmed.

A DEBTOR MAY PREFER ONE CREDITOR to the exclusion of another: *Chaffee v. Atlas Lumber Co.*, 43 Neb. 224, 47 Am. St. Rep. 753, 61 N. W. 637; *Snayberger v. Fahl*, 195 Pa. St. 336, 78 Am. St. Rep. 818, 45 Atl. 1065. But if a creditor purchases goods of a failing debtor, and in addition to the settlement of the claim due him pays the latter a part of the purchase price in money, with knowledge of his insolvency and his intent to hinder and delay other creditors, the sale is void: See the monographic note to *State v. Mason*, 34 Am. St. Rep. 397.

HANSCOM v. MEYER.

[60 Neb. 63, 82 N. W. 114.]

NEWSPAPER—WHAT IS.—A weekly publication, circulating among various classes of persons within the county and state, and containing printed matter consisting principally of legal notices and information regarding courts, and of legal matters in general, but also advertisements of a general character, literature of a general kind, and a limited amount of news of current events, is a newspaper.

NEWSPAPER—WHAT IS.—Although a weekly printed publication makes a specialty of some particular class of business, and conveys intelligence of particular interest to those engaged therein, this does not deprive it of its general classification as a newspaper, provided it has the distinguishing features required to make it a newspaper as ordinarily defined, such as news items and advertisements of a varied character intended for the information of the general reader.

NEWSPAPERS.—THE DISTINGUISHING FEATURES OF a newspaper are that it must be a publication, appearing at regular or almost regular intervals, at short periods of time, as daily or weekly, usually in sheet form, and contain news—that is, reports of recent occurrences, political, social, moral, religious, and items of a varied character, both local and foreign, intended for the information of the general reader.

J. H. McIntosh, L. F. Crofoot, and C. S. Elgutter, for the appellants.

G. E. Pritchett, for the appellee.

⁶⁹ **HOLCOMB, J.** In proceedings of foreclosure of a real estate mortgage in the district court of Douglas county, on an application for confirmation of a sale of real estate made in said action, the defendants, appellants, objected thereto, and moved to set aside the sale, on the ground that notice of sale by publication in the "Omaha Mercury" was insufficient, alleging that that publication was not a newspaper as provided by section 497 of the Code of Civil Procedure. The objection was overruled, and by appeal the case is brought to this court. The section referred to provides as follows: "Lands and tenements, taken in execution, shall not be sold until the officer cause public notice of the time and place of sale to be given, for at least thirty days before the day of sale, by advertisement in some newspaper printed in the county, or, in case no newspaper be printed in the county, in some newspaper in general circulation therein. . . . All sales made without such ⁷⁰ advertisement shall be set aside, on motion, by the court to which the execution is returnable."

The point in issue is whether the "Omaha Mercury" is a newspaper within the meaning of the section quoted. In the affidavit in support of the motion to set aside, it is said: "That said 'Omaha Mercury,' published weekly at Omaha, Nebraska, is a class paper devoted specially to the interests of the lawyers of Douglas county, Nebraska. That said 'Omaha Mercury' is a paper which is confined to the particular trade, calling, or business interest of the lawyers of Omaha, has a limited circulation, and is not a newspaper as by law provided and required." A copy of one issue of the paper is made an exhibit, which is said to be "a fair sample of said publication." The proprietor of the publication challenged makes affidavit that "he is the owner and proprietor of the 'Omaha Mercury,' a newspaper printed and circulated every Friday in the city of Omaha, Douglas county, Nebraska, and elsewhere. That this alliant says that it is not true that said 'Omaha Mercury' is a class paper, or that it is confined to the interests of the lawyers of Omaha or Douglas county. That said 'Omaha Mercury,' then known as the 'Omaha Watchman,' was established in the year 1870, and has been published weekly ever since said date. That said paper contains each week news of a general character, such as is to be found in the average weekly paper published in Nebraska; that of late years it has made a specialty of the news of the courts, and of legal matters in general, but that it is not true that it is devoted to the legal profession in any sense which would render it a 'class publication.' That said paper has a large and valuable subscription list, and that its said subscribers are of all classes and professions; that said newspaper has a wide circulation in Douglas county and the state of Nebraska, but that it is also taken and paid for by various classes of people in a great number of the states of the Union. That for the past twenty years it has been the custom of lawyers and others to publish legal notices in said paper—so ⁷¹ much so that the people of Douglas county and the state of Nebraska, and throughout the entire United States, look first in its columns for legal advertisements in which they are interested; that it has published in the past, and still continues to publish, the greater percentage of legal notices in Douglas county, including orders required to be published by the district and circuit court of the United States, and of the district and county courts of Douglas county, and that said paper is commonly designated by the judges of the aforesaid

courts as the paper in which to publish the various orders required to be published by said courts."

Webster's Dictionary defines a newspaper to be: "A sheet of paper printed and distributed, at short intervals, for conveying intelligence of passing events; a public print that circulates news, advertisements, proceedings of legislative bodies, public documents and the like." Burrill's Law Dictionary gives this definition: "A paper or publication conveying news or intelligence. A printed publication, issued in numbers at stated intervals, conveying intelligence of passing events. The term 'newspaper' is popularly applied only to such publications as are issued in a single sheet, and at short intervals, as daily or weekly." It is difficult, if not impossible, to determine with clearness and exactness where the line of demarcation should be drawn between a newspaper in a legal and common acceptance of the term and the numerous publications devoted to some special purpose, which circulate only among a certain class of the people, and which are not within the purview of statutes requiring publication of legal notices in some newspaper. The daily and weekly newspapers, common to all parts of the country, of general circulation among the people, without regard to class, vocation, or calling, devoted to the gathering and dissemination of news of current events of interest to all, and usually espousing and advocating principles of some political party with persistency, if not at all times with consistency, are, ⁷² without doubt, newspapers within the meaning of the statute. On the contrary, many publications, such as literary, scientific, religious, medical, and legal journals, are obviously for but one class of the people—and that class always but a small part of the entire public—are not newspapers within the legal and ordinary meaning of the word, and it would be manifestly unjust, as well as against the letter and spirit of the law, to recognize such publications as proper for the advertisement of legal notices, the object in all cases being to give wide and general publicity regarding the subject of which notice is required to be published. The paper in question partakes, in a degree, of the characteristics of each of the two classes mentioned. If, however, it has the distinguishing features required to make it a newspaper as ordinarily defined, the fact that it also makes a specialty of some particular class of business, and conveys intelligence of particular interest to those engaged in such business, will not thereby deprive it of its general classification as a newspaper within the meaning of the statute.

In *Lynch v. Durfee*, 101 Mich. 171, 45 Am. St. Rep. 404, 59 N. W. 409, it is held: "A weekly paper, containing matters of general interest, and having a general circulation among professional and business men, is a newspaper within the meaning of Howell's Statutes, section 5801, providing for the publication in a newspaper of certain notices in probate proceedings, though it is primarily devoted to disseminating matters of interest to the legal profession." In the opinion it is said: "But a newspaper, even in the days when these statutes were enacted, meant; what it means to-day, a sheet of paper printed and distributed at short intervals for conveying intelligence of passing events; a public print that circulates news, advertisements, proceedings of legislative bodies, public documents, and the like."

In *Lynn v. Allen*, 145 Ind. 584, 57 Am. St. Rep. 223, 44 N. E. 616, it is held that a periodical, ephemeral in form, issued daily except Sundays, devoted to the general dissemination of legal news, and containing other matters of general interest to the public, is such a paper.

⁷³ In the case of *Railton v. Lauder*, 126 Ill. 219, 18 N. E. 555, the evidence in the case showed that the "Chicago Daily Law Bulletin" was a paper published in Chicago, having a general circulation throughout the city of Chicago and the state of Illinois, among judges, lawyers, and real estate brokers, merchants, and business men generally. Its contents consisted, for the most part, of legal matters, but it contained advertisements not confined to any one calling or trade, as well as news and information of a general secular character. The paper in question was held to be a secular newspaper of general circulation within the meaning of the statute.

To the same effect is *Williams v. Colwell*, 18 Misc. Rep. 399, 26 Civ. Proc. Rep. 66, 43 N. Y. Supp. 720, 724, decided in 1896, where the writer of the opinion has collated the more important cases up to that date upon the subject. Says the writer of the opinion, after reviewing the authorities: "The facts stated in the affidavit and stipulation read on the motion bring this case within the cases cited sustaining publications of legal notices. While the principal news published in the 'Daily Mercantile Review' is of especial value to attorneys, bankers, brokers, commission merchants, and those engaged in the real estate business, yet it is shown by the affidavit and stipulation that several columns are devoted to general advertising, and to the publication of local and other news of general interest, and that it has a general circulation."

The paper in question has been established for a number of years, and is published weekly. As stated in an affidavit in the case: "Of late years it has made a specialty of the news of the courts, and of legal matters in general." It appears to have, according to the affidavit, a large and valuable subscription list, and to circulate among various classes of people throughout the county and state, as well as the United States. It has been recognized as a legal newspaper by the probate court of the county, the district court, and the federal courts. Its printed matter consists principally of legal notices, information regarding courts, and a legal directory of the ⁷⁴ Douglas county bar. Some advertising of a miscellaneous character, literature of a general kind, commonly designated plate matter, and what purports to be information of the actions of Congress, two addresses by lawyers, and a limited amount of general news of current events, are found in its columns, although we are constrained to say that there is a dearth of the latter, as shown by the exhibit, which has rendered it more difficult to reach a correct conclusion in this case. The principal distinguishing feature of a newspaper, in contemplation of the statute, in our opinion, is that it be a publication, appearing at regular or almost regular intervals, at short periods of time, as daily or weekly, usually in sheet form, and containing news; that is, reports of recent occurrences, political, social, moral, religious, and items of a varied character, both local and foreign, intended for the information of the general reader. It is the one quality of "news" which gives it its general interest and secures for it a general circulation among people of different classes and callings, whom the statute seeks to reach by the requirement of notice by publication in a newspaper. It should be noted, too, that, in a degree, the presence of advertisements not appealing to any particular class, trade or profession, constitutes a factor tending to bring a publication, possessing the qualifications heretofore mentioned, within the designation of a newspaper of general circulation. While some effort has been made by the legislature to define a newspaper, and limit the publication of legal notices to papers which are most likely to have a bona fide circulation among the general public where published, so far nothing of a permanent nature has been accomplished. In the absence of such legislation, we are disposed to the opinion, under the evidence presented, that the "Omaha

Mercury" is a newspaper within the meaning of the statute, and as defined by the authorities herein adverted to.

It follows that the ruling complained of is correct, and is affirmed.

NEWSPAPERS.—A JOURNAL PUBLISHED weekly, of general circulation, devoted primarily to the interests of the legal profession and the dissemination of legal news, but also containing matters of general interest, such as personal items, notices of passing events, general trade advertisements, and the like, is a newspaper: *Lynch v. Judge of Probate*, 101 Mich. 171, 45 Am. St. Rep. 404, 59 N. W. 409.

RUST-OWEN LUMBER COMPANY v. HOLT.

[60 Neb. 80, 82 N. W. 112.]

MECHANICS' LIENS—CONTRACTUAL RELATIONS.—A mechanic's lien in favor of a principal contractor grows out of the contractual relations between the owner of the property improved, or his authorized agents, and such principal contractor, and the right thereto is based upon contract, and for the purpose of securing debts due thereunder.

MECHANICS' LIENS ON PROPERTY OF MARRIED WOMEN.—Under statutes giving liens for work or material furnished by virtue of a contract with the owner of the land, a mechanic's lien cannot be created upon the land of a married woman under a contract with her husband alone, acting merely for himself.

HUSBAND AND WIFE—AGENCY OF HUSBAND.—Whether or not a husband is the agent of his wife is a question of fact, and cannot be presumed from the marital relation alone.

MECHANICS' LIENS ON PROPERTY OF MARRIED WOMEN—KNOWLEDGE OF WIFE.—The mere fact that a wife has knowledge of the construction of a building by her husband on her property does not of itself necessarily establish the agency of her husband to charge such property with a lien for material used thereon, nor does her mere failure to dissent from the proposed transaction import an intention to bind her real estate to the payment of the debt.

MECHANICS' LIENS ON PROPERTY OF MARRIED WOMEN—FAMILY RESIDENCE—RATIFICATION OF HUSBAND'S ACTS.—No conclusive presumption of ratification of the husband's acts arises from the occupation by his wife with him of a building as a family residence, constructed by him on her land, so as to make effective a mechanic's lien, where none theretofore legally attached. At most, it is only a circumstance to be considered with other facts and circumstances for the purpose of determining the question of the alleged ratification.

E. N. Kauffman and A. D. McCandless, for the appellants.

L. W. Colby, for the appellee.

⁸³ HOLCOMB, J. The plaintiff, appellant, began an action in the court below, against Annie R. Holt, appellee, on an account, under a verbal contract alleged to have been entered into with Isaac J. Holt, her husband, acting as her agent, for lumber and material sold for the erection of a dwelling-house on the wife's land, and sought to have a mechanic's lien decreed on the premises on which the building was erected. The husband was joined as defendant, as well as the cross-petitioner, Label, who sought to establish a like lien for a small bill of hardware—about sixteen dollars—for the same building. The court found generally for the defendants Holt, and dismissed the action. From this judgment the plaintiffs and the cross-petitioner, Label, appeal to this court.

The wife was the owner of the property, an unimproved lot in the village of Wymore, upon which the building was erected, her title being evidenced by a deed duly recorded. She testified that she purchased the property with her own money, paying one hundred dollars in cash, and securing the remainder of the purchase price, two hundred dollars, by a mortgage on the premises. The only substantial point of controversy is the agency or authority of the husband to charge the wife's real estate with the liens sought to be enforced.

It does not appear from the evidence whether the plaintiff relied upon its supposed right to a mechanic's lien upon the assumption that the husband owned the property, nor does it appear that any effort upon its part was made to ascertain in whom the legal title thereto rested. The original estimate introduced in evidence, among other things, says: "I have this day purchased of Rust-Owen Lumber Company the following bill of goods to be used on my lots in the erection of a building for dwelling-house and for which I agree to pay two hundred and twenty-five dollars cash." This is signed by the husband individually, and without reference to the wife or her interest in the lots she then ⁸⁴ owned. We think it is quite satisfactorily established by the evidence that the material was in the first instance sold to the husband on his personal account, and not as the agent of his wife. It cannot be said that the husband had any express authority to obligate his wife to the payment of the account, or to charge her real estate with a lien for the improvements made by him thereon. Under the pleadings, unless an agency, express or implied, may be inferred from the facts and circumstances surrounding the transactions, the

plaintiff is without a remedy as against the wife or her real property, which is sought to be charged with the lien.

It is said in *Copeland v. Kehoe*, 67 Ala. 594, 597: "A builder's or mechanic's lien is purely statutory. Its character, operation, and extent must be ascertained by the terms of the statute creating and defining it. Of itself, it is a peculiar, particular, special remedy given by statute, founded and circumscribed by the terms of its creation, and the courts are powerless to take it up where the statute may leave it, and extend it to meet facts and circumstances which they may believe present a case of equal merit, or a necessity of the same kind, as the cases or necessities for which the statute provides."

Section 1, chapter 54, of the mechanic's lien law of this state, provides that any person who shall perform any labor or furnish any material for the erection of any dwelling-house by virtue of a contract or agreement, express or implied, with the owner thereof, or his agents, shall have a lien to secure the payment of the same upon such house and the lot of land upon which the same shall stand.

A mechanic's lien in favor of a principal contractor, therefore, grows out of the contractual relations between the owner of the property improved, or his or her authorized agents, and such principal contractor, and the right thereto is based upon contract and for the purpose of securing debts due thereunder.

It is said in *Boisot on Mechanics' Liens*, section 276: ⁸⁵ "Under statutes that give liens for work or material furnished by virtue of a contract with the owner of the land, a mechanic's lien cannot be created upon the land of a married woman for work done or materials furnished in improving such land under a contract with her husband, where the husband acts merely for himself": Citing numerous authorities, among which is *Bradford v. Higgins*, 31 Neb. 192, 47 N. W. 749.

From the evidence in this case, we think it may fairly be said that the wife was cognizant of the fact that her husband was engaged in the construction of the building upon the real estate owned by her; but that she took no part in the planning or construction of the building, or in the purchase of the material therefor, or in any way gave directions regarding the labor or material entering into the building. The family lived in rented property in the same town, and it appears that for most of the time the wife was unable to leave her home on account of illness. The evidence discloses that in the discussion of the subject by the husband and wife, it was understood that he was

to pay for the material necessary for the building by working at his trade, that of carpenter and builder. The wife might very naturally acquiesce in having the proposed building erected by her husband to be paid for in such manner, and yet most strenuously object if thereby her property was to be encumbered, and probably sold to satisfy the debt secured thereby. She and her husband both deny specifically that she authorized him to act for her, and say that whatever he did was on his own account. The trial court, doubtless, reached this conclusion, and, unless it is against the clear weight of evidence, the finding ought not to be overturned here, as has frequently been held heretofore. The wife's right to the control and disposition of her separate property, and to contract with relation thereto, is not to be ignored or regarded with indifference. In that respect, she stands upon an equality with all others capable of contracting. The materialman may not sell to ⁸⁶ whomsoever will buy, and then assert a lien upon real estate improved with such material, without reference to the authority of the person so purchasing to encumber the same. His rights are prescribed by statute, and he can only assert them by a compliance therewith, under a contract, expressed or implied, with the owner or her authorized agent. It is true that a married woman, by remaining silent and acquiescing in a contract made by her husband assuming to act as her agent, and acting with her knowledge, is estopped from denying such agency. In this case, however, we find no element of estoppel. The husband did not contract as her agent, and the plaintiff was charged with notice by the public records that she was the owner of the land upon which the building was to be erected.

Whether or not the husband is the agent of the wife is a question of fact, to be determined as other like questions, and will not be presumed from the marital relations alone. The mere fact that the wife had knowledge of the construction of the building by her husband on her property does not, in our judgment, of itself necessarily establish the agency of her husband with authority to charge such property with a lien for material used thereon; nor will her mere failure to dissent from the proposed transaction import an intention to bind her real estate to the payment of the debt. In *Ziegler v. Galvin*, 45 Hun, 44, 48, in a case similar to the one at bar, and in construing a like statute, the court says: "We are aware that this conclusion may result in a loss to the plaintiff and seem a hardship, inasmuch as her property has been benefited by the plaintiff's labor;

but this reason cannot change the effect of the statute or be considered in construing the same. Contractors and subcontractors must conform to its provisions, for they cannot be changed to meet the exigencies in individual cases. The wife who has a homestead coming to her through her mother may be willing, even pleased, to have her husband repair and improve the same, and ⁸⁷ yet if she has no income or resources with which she can pay for the repairs or improvements, she might not have consented or be willing that they should be made if, in order to pay for the same, she had to submit to a sale of her homestead." The views thus expressed seem to be sound, and meet with our approval.

It is suggested that the wife ratified all of the husband's acts by occupying, with the husband, the house constructed on her land. We cannot agree with counsel's contention in this respect. This is carrying the rule of ratification farther than we are willing to go. The building was intended as a family residence. The husband had obligations resting upon him as the head of the family, and it was incumbent upon him to provide them a home. As before stated, his wife could very properly consent to his constructing a building on her property for a residence, without intending thereby that he should act as her agent, or encumber her real estate, and thus entirely deprive her of it by its sale to satisfy such encumbrance.

In *Garnett v. Berry*, 3 Mo. App. 197, the syllabus reads: "Authorization or ratification of a contract to build a house on the wife's lot will not be presumed from the fact that the house was to be a residence for the wife and children, with the husband." In the opinion, says the court: "Plaintiff claims, in the present case, that the wife's authorization or her ratification of the contract may be assumed from the fact that the house was to be a residence for herself and children, with her husband. . . . But here it was no part of Mrs. Chamberlain's duty or care to provide a home for herself and her children. That was incumbent on the husband and father. The occupancy of the premises was his beneficial use, and not hers."

We do not think that from the occupation by the wife with her husband of a building as a family residence, constructed by the husband on the wife's land, a conclusive presumption of ratification of the husband's acts ⁸⁸ thereby arises, so as to make effective a mechanic's lien, where none theretofore legally attached; at most, it is only a circumstance, to be considered with

other facts and circumstances for the purpose of determining the question of the alleged ratification.

The judgment of the lower court is supported by sufficient competent evidence, and is therefore affirmed; this, however, without prejudice to a future action against the husband for the debt due on the accounts sued on.

Mechanics' Liens on Separate Property of Married Women.

Under the fiction of the common law that a married woman's legal existence is merged in that of her husband, she is presumed to be incapable of binding herself by any executory contract. Whenever she is incapable of making a contract for herself there can be no lien against her separate estate. However, the personal disabilities of married women have, under the more enlightened legislation of recent times, been almost entirely removed, and their right to make contracts concerning all things pertaining to the management, sale, purchase, control, and disposition of their separate estates, is now generally recognized.

Wherever statutes authorize a married woman to hold, devise, bequeath, and convey her property, real and personal, the same as if she were a feme sole, or contain similar provisions, she may enter into a contract for the improvement of her separate property, and such contract is sufficient basis for a mechanic's lien for labor and materials: *Hoffman v. McFadden*, 56 Ark. 217, 35 Am. St. Rep. 101, 19 S. W. 753; *Stephenson v. Ballard*, 82 Ind. 87; *Wright v. Blackwood*, 57 Tex. 644. A married woman may contract for the construction of improvements on her separate estate, so as to subject it to a mechanic's lien: *Carthage Marble etc. Co. v. Bauman*, 44 Mo. App. 386; *Murphy v. Murphy*, 15 Mo. App. 600. A married woman's power to contract for improvements, as well as repairs, to her real estate is inseparably incident to her right to take and hold real estate for her own separate use; and a mechanic's lien against a married woman's separate estate for work done and materials furnished in and about a dwelling erected for her and under her contract is valid: *Appeal of Germania Sav. Bank*, 95 Pa. St. 329; *Ex parte Schmidt*, 62 Ala. 252; *Wadsworth v. Hodge*, 88 Ala. 500, 7 South. 194; *Vail v. Meyer*, 71 Ind. 159; *Shilling v. Templeton*, 66 Ind. 585; *Carpenter v. Leonard*, 5 Minn. 155. It has also been held that her verbal contract was sufficient to make her property subject to the lien: *Wadsworth v. Hodge*, 88 Ala. 500, 7 South. 194; *Cutcliff v. McAnally*, 88 Ala. 507, 7 South. 331.

But a married woman is incapable of binding herself, or her separate property, under the common law by her contracts. Hence, in the absence of enabling statutes, her separate estate is not chargeable for work and labor done, nor materials furnished and used in building upon her separate estate, in a proceeding to enforce a mechanic's lien: *Gray v. Pope*, 35 Miss. 116, 72 Am. Dec. 117;

Sexton v. Albertl, 10 Lea, 452; O'Malley v. Coughlin, 3 Tenn. 431; O'Neil v. Percival, 20 Fla. 937, 51 Am. Rep. 634; Fetter v. Wilson, 12 B. Mon. 90; Johnson v. Parker, 27 N. J. L. 239.

In those jurisdictions where a married woman's real estate may be bound by a lien for improvements made thereon the contract therefor must be made by her or her authorized agent, in order to bind her estate, and it is well settled that where she may so contract, she may contract through her authorized agent: Chicago Lumber Co. v. Mahan, 53 Mo. App. 425; Interstate Building etc. Assn. v. Ayers, 177 Ill. 9, 52 N. E. 342.

Agency of Husband.—It is also well settled that a husband may act as agent of his wife, and that a contract for the construction of a building or other improvement upon her land, made by a husband acting as her agent, under due authority, binds her, especially when ratified by her acts and conduct during the progress of the work: Bumgartner v. Hall, 163 Ill. 136, 45 N. E. 168; Chicago Lumber Co. v. Mahan, 53 Mo. App. 425; Wheaton v. Trimble, 145 Mass. 345, 1 Am. St. Rep. 463, 14 N. E. 104. But when a husband contracts in his own name for improvements on the land of his wife, she cannot be held personally under the contract, nor can a lien on the land be maintained under it, in the absence of clear and convincing evidence that he acted as her agent in making the contract: Thompson v. Kehrman, 60 Mo. App. 488. Although a husband may become the agent of his wife to make a contract for her for the improvement of her real property, his authority to so act is never implied from the marital relation alone, nor from the mere fact that he occupies, manages, and controls her real estate: Hoffman v. McFadden, 56 Ark. 217, 35 Am. St. Rep. 101, 19 S. W. 753; Miller v. Hollingsworth, 33 Iowa, 224; Price v. Seydel, 46 Iowa, 696. As a mechanic's lien is generally given only where the work is done or the material furnished by virtue of a contract with the owner of the premises improved, or with his or her agent, trustee, contractor, or subcontractor, if it does not appear that the wife knew at the time that the title to the land was in her, nor that she was in possession of any information from which she might have inferred that she was the owner of the property when the improvements were made, it cannot be held that her husband made the contract for the improvements as her agent; Duross v. Broderick, 78 Mo. App. 260. A mechanic is entitled to a lien for work and labor performed on a house standing on the land of a wife, if such labor is performed under a contract with her husband as her agent, for her use and benefit, with her knowledge and consent, and for which they both promised to pay: Burdick v. Moon, 24 Iowa, 418. Following Kidd v. Wilson, 23 Iowa, 464. And if a married woman authorizes her husband to act for her, and as her agent to contract for the building of a house upon her separate real estate, the law gives a mechanic's lien thereon, although she may

not have intended to charge the property therewith: *Jones v. Pot-hast*, 72 Ind. 158. If a husband contracts for material to improve the property of his wife, no contract between the husband and wife can defeat the right of the contractor to a mechanic's lien, if such contract is not disclosed to the contractor: *Bethell v. Chicago Lumber Co.*, 39 Kan. 230, 17 Pac. 813.

Under statutes giving the husband the management and control of the community real property, and providing that such property shall be subject to mechanics' liens, he is empowered to contract for the erection of buildings on the community real estate, and subject it to a mechanic's lien: *Littell etc. Co. v. Miller*, 3 Wash. 480, 28 Pac. 1035; *Washburn v. Burris*, 34 N. J. L. 18. A lien for materials will attach to land which is the wife's separate property, if the record title is in the community and the material is furnished in reliance upon the community ownership of the property and without notice of her separate right: *Hord v. Owens*, 20 Tex. Civ. App. 21, 48 S. W. 200; *House v. Schultz*, 21 Tex. Civ. App. 243, 52 S. W. 654. The rule is otherwise and the lien cannot be maintained if the contractor has notice that the property is the separate estate of the wife, although the title stands in the community: *Owens v. Hord*, 14 Tex. Civ. App. 542, 37 S. W. 1093.

There may also be a mechanic's lien upon land held in joint tenancy by husband and wife under a contract signed by the husband alone, but with the consent and acquiescence of the wife: *Dalton v. Tindolph*, 87 Ind. 490. And the same rule prevails when the land is held by the husband and wife as tenants by the entireties: *Wilson v. Logue*, 131 Ind. 191, 31 Am. St. Rep. 426, 30 N. E. 1079. And even though the wife of such tenant objects to the contract at the time it is entered into by her husband, the property will be bound for the mechanic's lien if such act of her husband is afterward ratified and the building is accepted by her: *Taggart v. Kem*, 22 Ind. App. 272, 53 N. E. 651.

In California a mechanic's or materialman's lien may be created on a homestead by the act of the husband alone without the consent or joint action of the wife: *Palmer v. Lavigne*, 104 Cal. 30, 37 Pac. 775. In Texas, however, no mechanic's lien can be fixed upon a homestead unless the contract for material is signed by the wife: *Ricker v. Schadt*, 5 Tex. Civ. App. 460, 23 S. W. 907; *Ligowski v. Crooker*, 86 Tex. 324, 24 S. W. 278, 788. And the same rule prevails in Michigan: *Jossman v. Rice*, 121 Mich. 270, 80 Am. St. Rep. 493, 80 N. W. 25.

In many instances the agency of a husband is implied from the circumstances. Thus, if a married woman mortgages her separate property to raise money to improve it, her husband taking the money, and with her knowledge and consent, erecting the building, employing another to plaster it, the necessary inference follows that the husband was either her agent or a contractor to build the house, and in either case the plasterer has a right to a mechanic's

lien: *Thompson v. Shepard*, 85 Ind. 353. A finding that a husband acted as the duly authorized agent of his wife in employing a person to perform labor upon her house is justified, in a proceeding to enforce a mechanic's lien therefor, by evidence that the husband has general management of the property, that he contracted for the performance of the labor, that she knew that the work was being done upon the house, and personally directed part of the work: *Wheaton v. Trimble*, 145 Mass. 345, 1 Am. St. Rep. 463, 14 N. E. 104. If a married woman is shown to have had personal knowledge of work done and material furnished on her separate estate, and to some extent to have given personal directions concerning it, although her husband was the principal manager, and to have joined him in the execution of a note in settlement of the claim, she must be held to have bound her property, and a mechanic's lien may be enforced against it: *Collins v. Megraw*, 47 Mo. 495. And if a husband erects a dwelling on land, the title to which is in his wife, and she is aware that such building is being erected, and gives directions to the workmen, the agency of the husband will be presumed, and the property will be liable to a mechanic's lien: *Bradford v. Peterson*, 30 Neb. 96, 46 N. W. 220; *McCormick v. Lawton*, 3 Neb. 449; *Scales v. Paine*, 13 Neb. 521; *Howell v. Hathaway*, 28 Neb. 807, 44 N. W. 1136. As a husband cannot bind his wife's separate estate, even for necessary repairs, without her authority, a mechanic's lien filed against her separate property, but not averring the coverture and that the labor was done and material furnished upon her authority and with her consent, is fatally defective and void: *Steinman v. Henderson*, 94 Pa. St. 313; *Dearie v. Martin*, 78 Pa. St. 55; *Lloyd v. Hibbs*, 81 Pa. St. 306; *Schiffer v. Saum*, 81 Pa. St. 385; *Shryock v. Buckman*, 121 Pa. St. 248, 15 Atl. 480.

If a husband has work done on his wife's land it should be carefully ascertained by those doing the work or furnishing the material whether he acts as agent or as the principal contractor: *Rand v. Parker*, 73 Iowa, 396, 35 N. W. 493.

In Maryland, if a husband, of his own motion, has work done on his wife's estate, she must be specially notified by the mechanic claiming a lien, but if the husband acts as the wife's agent, no such notice is required: *Conway v. Crook*, 66 Md. 290, 7 Atl. 402; *Jarden v. Pumphrey*, 36 Md. 361.

Estoppel Against Wife.—The participation of a wife in the work done on her separate estate, or her directions to the workmen employed as to how such work should be or is desired done, is often of such a nature as to induce the court to hold that she is estopped from denying that the contract for such work, though made by her husband alone, was not made by her authority, nor with her knowledge or consent. When such estoppel is established against a wife her property is bound for the mechanic's lien. Thus, the separate property of a married woman may be charged with a mechanic's lien for materials furnished for the erection of a building thereon,

although the contract under which they were furnished was signed by her husband alone, if it is shown that she examined the plans of the building, and the materials were furnished by the claimant with her knowledge and consent, and that they were reasonably necessary for the improvement of the property, and were used for that purpose, and that she was frequently upon the premises during the progress of the work, giving directions as to the materials and as to the manner of construction: *Bodey v. Thackara*, 143 Pa. St. 171, 24 Am. St. Rep. 526, 22 Atl. 754; *Bevan v. Thackara*, 143 Pa. St. 182, 24 Am. St. Rep. 529, 22 Atl. 873.

In *Spears v. Lawrence*, 10 Wash. 368, 45 Am. St. Rep. 789, 38 Pac. 1049, it was held that the separate property of the wife is subject to a mechanic's lien, for the erection of a building thereon, though she did not join in the contract therefor, if during the progress of the work she was about the premises with her husband and helped select the colors of the paints to be used thereon. If a husband enters into a contract for the erection of a building on his wife's land with her knowledge, she participating in conversations between him and the contractors relative to the work during the time it is being done, and making no objection at any time, she is estopped, and the land is liable for mechanics' liens arising out of the work done. So held in *Jobe v. Hunter*, 165 Pa. St. 5, 44 Am. St. Rep. 639, 30 Atl. 452. If, after a contract for labor on a building belonging to a wife is made by her husband with one who is ignorant of her interest, and she knowing what is being done and participating therein, does not disclose her interest or prevent the work, she has been held to be estopped to set up her rights as a defense to a mechanic's lien: *Bruck v. Bowermaster*, 36 Ill. App. 510; *Schwartz v. Saunders*, 46 Ill. 18; *Greenleaf v. Beebe*, 80 Ill. 522; *Watson v. Carpenter*, 27 Ill. App. 492.

Married women, in having the powers and privileges of *femes sole* conferred upon them, with respect to their property, must assume the responsibilities and duties which necessarily follow. If a married woman, being in possession of a house and lot with her husband, neglects to record the deed showing title in her until after he has contracted for improvements thereon, and knows that her husband has made such contract, and is present on several occasions at the house during the progress of the work, and hears the contractor and her husband conversing about it, and fails to make known her claim to the property, or repudiate the acts of her husband, and after the work is completed she and her husband occupy the house, she is estopped from denying that her husband was acting as her agent in making the contract: *Anderson v. Armistead*, 69 Ill. 452. Evidence that title to the land on which a house was built was in a married woman, that she knew where her husband got the brick with which the house was built and the price of them, and that she furnished what money was paid on account of the brick and the building of the house, is sufficient to show that her

husband acted as her agent in the purchase of the brick, and these facts work an estoppel against her, as against the enforcement of a mechanic's lien: *Tuttle v. Howe*, 14 Minn. 145, 100 Am. Dec. 205. If a wife, with knowledge that her husband has made false representations as to the ownership of the property and has contracted in his own name for the erection of a building thereon, assists in procuring the work to be done under the contract, without disclosing to the contractor the title to her property, which is of record, she is estopped to assert her title for the purpose of defeating a mechanic's lien arising out of such contract: *Bastrup v. Prendergast*, 179 Ill. 553, 70 Am. St. Rep. 128, 53 N. E. 995; *Rand v. Parker*, 73 Iowa, 396, 35 N. W. 493; *Frohlich v. Carroll* (Mich.), 86 N. W. 1034.

On the other hand, it has been held that a married woman's property is not subject to a mechanic's lien, though the building is located within forty feet of the dwelling occupied by her and her husband, and she witnessed its construction and progress, and gave some directions to the carpenters, if she showed no more interest in the improvements than a woman would take in a building on the land of her husband, and the contract for the work was made with him, and the materials procured on his order and personal credit, without authority to act as her agent, and without consultation with her or with her knowledge: *Hoffman v. McFadden*, 56 Ark. 217, 35 Am. St. Rep. 101, 19 S. W. 753. And to the same effect is *Lyon v. Champion*, 62 Conn. 75, 25 Atl. 392. It has also been held that a wife is not precluded from contesting the validity of a mechanic's lien upon her property, for work done at the request of her husband by the fact that she knew of the work and participated therein, while it was being performed, when there is no statute creating a liability against her under such circumstances: *Santa Cruz etc. Co. v. Lyons*, 117 Cal. 212, 59 Am. St. Rep. 174, 48 Pac. 1097; *Johnson v. Parker*, 27 N. J. L. 239.

Knowledge and Consent of Wife.—As the establishment of a mechanic's lien against the property of a married woman must depend upon the fact that she either entered into the contract under which it came into existence, or that such contract was entered into by her authorized agent, it seems clear that no such lien can be established on the theory of the husband's agency when she protests against the execution of the contract by her husband, and at all reasonable times protested against the erection of the work: *James v. Dalley*, 107 Iowa, 463, 78 N. W. 51; *Getty v. Tramel*, 67 Iowa, 288, 25 N. W. 245. And if a husband, without the consent and against the protests of his wife, contracts for, and proceeds to erect a dwelling-house on land owned by her, a materialman cannot acquire a lien on such land for material furnished, although she occupies the premises with her husband, and has knowledge that the work is being done: *Morrison v. Clark*, 20 Utah, 432, 77 Am. St. Rep. 924, 59 Pac. 235. Although there is some conflict in

the authorities, it is a general rule that when a building is erected on a wife's land at the sole request and upon the credit of her husband, a mechanic's lien does not attach to the land, although she knew of, and did not object to, the erection while it was in progress: *Flannery v. Rohrmayer*, 46 Conn. 558, 33 Am. Rep. 36; *Lauer v. Bandow*, 43 Wis. 556, 28 Am. Rep. 571; *Wendt v. Martin*, 89 Ill. 139; *Poe v. Ekert*, 102 Iowa, 361, 71 N. W. 579; *Young v. Swan*, 100 Iowa, 323, 69 N. W. 566; *Baker v. Stone* (Tenn.) 58 S. W. 761; *Hall v. Erkitz* (Mich.), 84 N. W. 310; *Knott v. Carpenter*, 3 Head, 542, 75 Am. Dec. 779; *Huntley v. Holt*, 58 Conn. 445, 20 Atl. 469; *Alexander v. Perkins*, 71 Mo. App. 286; *Bradford v. Higgins*, 31 Neb. 192, 47 N. W. 749; *Hawkins Lumber Co. v. Brown*, 100 Ala. 217, 14 South. 110; *Washburn v. Burns*, 34 N. J. L. 18; *Price v. Seydel*, 46 Iowa, 696; *Getty v. Tramel*, 67 Iowa, 288, 25 N. W. 245. A husband has no power to create a mechanic's lien on his wife's property without her authority or consent, and if the credit is given solely to him for work done or materials furnished in erecting improvements on her property, no statutory lien on it is created, although the wife has knowledge of the work while it is in progress, and occupies the house as a dwelling after its completion: *Wadsworth v. Hodge*, 88 Ala. 500, 7 South. 194; *Lauer v. Bandow*, 43 Wis. 556, 28 Am. Rep. 571. If a husband contracts in his own name for improvements on the lands of his wife, she cannot be held personally under the contract nor can a lien on the land be maintained under it, in the absence of clear, cogent, and persuasive evidence that he acted as her agent in making the contract, and the mere fact that she knew and assented to the erection thereof has no tendency of itself to prove that the husband acted as her agent; it is only when such evidence is supplemented by further proof to the effect that the wife actually participated in the making of the improvement, by giving directions as to the manner and mode of doing the work that the question of the agency of the husband may be submitted to the jury: *Carthage Marble etc. Co. v. Bauman*, 44 Mo. App. 386; *Thompson v. Kehrmann*, 60 Mo. App. 488. The making of an improvement under an agreement with her husband does not authorize a lien upon his wife's realty, and the fact that the wife saw the improvement going on and made no objection is not sufficient to bind her: *Kline v. Perry*, 51 Mo. App. 422; *Hoffman v. McFadden*, 56 Ark. 217, 35 Am. St. Rep. 101, 19 S. W. 753. Although a wife has knowledge that the work is progressing, mere neglect on her part to inform the persons with whom her husband has contracted for the improvement of her separate estate, as to such ownership, cannot be construed as consent by her: *Coorsen v. Ziehl*, 103 Wis. 381, 79 N. W. 562; *Huntley v. Holt*, 58 Conn. 445, 20 Atl. 469. Some cases hold that the knowledge and consent of the wife is alone sufficient to bind her property for the improvement made thereon. Thus, if a building necessary for the improvement of the separate estate of the

wife is erected thereon under a contract made with the husband alone, but with her knowledge and consent, it has been held that the property is subject to a mechanic's lien for materials reasonably necessary to its erection, and used in its construction: *Bevan v. Thackara*, 143 Pa. St. 182, 24 Am. St. Rep. 529, 22 Atl. 873; *Bodey v. Thackara*, 143 Pa. St. 171, 24 Am. St. Rep. 526, 22 Atl. 754; *Althen v. Tarbox*, 48 Minn. 18, 31 Am. St. Rep. 616, 50 N. W. 1018; *Kelly v. McGehee*, 137 Pa. St. 443, 20 Atl. 623.

Under statutes in some of the states, one who furnishes material for a house which a husband is building on his wife's land with her knowledge and consent may have a lien thereon, although the material was purchased by the husband upon his credit alone without the authority of his wife: *Heath v. Solles*, 73 Wis. 217, 40 N. W. 804; *North v. La Flesh*, 73 Wis. 520, 41 N. W. 633. Under such statutes proof of the "knowledge" of the wife without more is not sufficient to bind her property for the lien: *Smith v. Gill*, 37 Minn. 455, 35 N. W. 178.

Consent in Writing—When Required.—Under statutes in some of the states, the separate estate of married women cannot be subjected to the satisfaction of a lien for improvements thereon, although they are made with her knowledge, unless the contract upon which the lien is based was executed by her in the manner prescribed by the statute, and when a married woman's contracts are required to be in writing, a person who performs labor or furnishes material in the erection of improvements upon the land of a married woman is not entitled to a lien thereon, unless the contract therefor was in writing, signed by the wife: *Passmore v. Easton*, 90 Ky. 380, 14 S. W. 356; *Fetter v. Wilson*, 12 B. Mon. 91; *Thompson v. Taylor*, 110 N. C. 70, 14 S. E. 513; *Weathers v. Borders*, 124 N. C. 610, 32 S. E. 881; *Hall v. Erkfitz* (Mich.), 84 N. W. 310. Thus, if the law requires that the contract of a married woman must be in writing, the requirement will be enforced as regards a mechanic's lien. Hence, such lien does not attach under such statute to the estate of a married woman for any improvement made thereon, unless contracted for in writing by her jointly with her husband, or has been contracted for by the husband with the wife's consent in writing: *Cameron v. McCullough*, 11 R. I. 173; *Hall v. Erkfitz* (Mich.), 84 N. W. 310; *Weathers v. Borders*, 124 N. C. 610, 32 S. E. 881.

HIGH SCHOOL DISTRICT v. LANCASTER COUNTY.

[60 Neb. 147, 82 N. W. 380.]

TAXATION—VALUATION—RATE.—Not only the valuation of property for the purpose of taxation, but the rate thereof as well, must be uniform. It is not within the power of the legislature to provide otherwise, either directly or indirectly.

CONSTITUTIONAL LAW—HIGH SCHOOLS—TAXATION.—A statute providing that pupils residing without the limits of high school districts may attend such schools free of charge, and that an arbitrary sum shall be paid out of the general fund of the county, as compensation to such high school district for such tuition, which sum may, in any case, fall below or exceed the cost of such tuition, is void, as being in violation of constitutional provisions declaring that the legislature may provide such revenue as is needed by levying a tax by valuation so that every person and corporation shall pay a tax in proportion to the value of their property, and that the legislature shall have no power to release or commute taxes, and that all taxes for municipal purposes shall be uniform in respect to the persons and property within the jurisdiction of the body imposing them.

W. C. Corey, R. Ryan, and A. G. Greenlee, for the appellant.

T. C. Munger and J. L. Caldwell, for the appellee.

150 NORVAL, C. J. This suit was brought in the district court of Lancaster county to test the constitutionality of sections 1 and 3, chapter 62, of an act of the legislature approved April 1, 1899, entitled, "An act to provide free attendance at public high schools of nonresident pupils to provide for the expense thereof, and to amend section 3 of subdivision 6, sections 2 and 7 of subdivision 14, and 2 of subdivision 17, chapter 79, Compiled Statutes of Nebraska for 1897, and to repeal said original sections now existing": Session Laws 1899, c. 62; Comp. Stats., c. 79, subd. 6. The sections mentioned are as follows:

"Section 1. That all regularly organized public high **151** schools determined by the state superintendent of public instruction to be properly equipped as to teachers, appliances, and course of study, shall hereafter be open to attendance by any person of school age residing outside of the district, resident of the state, whose education cannot profitably be carried further in the public school of the district of his residence; provided, . . . that said pupil has completed the common school course prescribed by the state superintendent for work below the high school; provided, further, such nonresident pupils shall be subject in all respects to the same rules and re-

strictions as those which govern resident pupils attending such high school, and attend the nearest high school of approved grade, or any high school of approved grade in the county of their residence; provided, further, when any high school shall be unable to furnish accommodations to nonresidents without constructing or renting additional buildings, the board of education may refuse admission to such pupils."

"Sec. 3. The school board of each school district of this state whose high school is attended by pupils under the provisions of this act, shall, at the close of each school year, report, in such form as the state superintendent may prescribe, to the county board of each county in which such pupils are residents, the number of pupils attending such high school from said county and the length of time of attendance of each pupil in weeks as hereinafter specified, and said county board shall, at the first regular meeting after the filing of such report, allow said district the sum of seventy-five cents for each pupil reported for each week during any part of which said pupil shall have been in attendance, and order a warrant drawn on the general fund of said county in favor of said school board for such sum, and the teacher's register shall be prima facie evidence of attendance of pupils set forth in such claim."

Under this act, High School District No. 137, of Havelock, Nebraska, filed a petition in the district court of Lancaster county, on appeal from the disallowance of its ¹⁵² claim against the county for tuition for pupils attending its high school, resident within said county, but outside said high school district. To this petition a general demurrer was sustained, and, the plaintiff electing to stand on its petition, the action was dismissed, and its comes to this court on error.

It is argued that inasmuch as a taxpayer inside the high school district must, under this act, pay the difference, if any, between the cost of tuition of nonresident pupils and the seventy-five cents per week allowed by section 3 of the act to be paid out of the general fund of the county, and must also pay his proportionate share of the seventy-five cents per week, with the other taxpayers of the county, in addition to bearing the whole of the expense of educating those pupils resident within the limits of the high school district, the law violates sections 1, 4, and 6 of article 9 of the constitution. Said sections are as follows:

"Section 1. The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the

value of his, her, or its property and franchises, the value to be ascertained in such manner as the legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, innkeepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates."

"Sec. 4. The legislature shall have no power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever."

"Sec. 6. The legislature may vest the corporate authorities ¹⁵³ of cities, towns, and villages with power to make local improvements by special assessment, or by special taxation of property benefited. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

Before entering at large upon the discussion of the questions presented by the record, we would say that it does not appear to the court that the constitutional objections urged against this act are in any wise mitigated by the provision in section 3 thereof which grants to the school district, as compensation for the tuition of such nonresident pupils, the fixed and arbitrary sum therein named. Such sum may fall below, or exceed, the cost of such tuition, and is, therefore, not a factor tending to mitigate or offset any objections that are raised in the case. So far as it affects the question, the act may have as well provided that such tuition might be without cost to a taxpayer resident outside such school districts. An act providing that nonresident pupils should be taught free of cost to taxpayers outside the limits of the district would, in our opinion, violate section 4 of article 9 of the constitution, for it would, in effect, release from their proportionate share of the taxes necessary to pay the cost of tuition of such nonresident pupils all portions of the county lying outside the limits of such high school district, and would be taxing one portion of a county for the benefit of another portion: *Belle Point v. Pence*, 13 Ky. Law Rep. 371, 17 S. W. 197.

We will now discuss the constitutional questions thus involved, keeping in view the oft-repeated principle of this court that the judiciary will not declare an act of the legislature unconstitutional unless it is clear that such act is inhibited by the fundamental law: *State v. Poynter*, 59 Neb. 417, 81 N. W. 431, and cases cited. It will be observed that section 1 of the constitution, quoted, prescribes among other things, substantially, that the legislature shall provide ¹⁵⁴ such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises, etc. Section 6 provides, substantially, that, for all corporate purposes, except certain ones therein enumerated, all municipal corporations may be invested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same; and section 4 prohibits the legislature from releasing or discharging any county, city, township, town, or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of the taxes to be levied for state purposes, or due any municipal corporation, and from commuting any such taxes, in any form whatever. For the purposes of this case, assume that the seventy-five cents per week allowed to be collected by the act from the county generally be insufficient to meet the expenses of educating the nonresident pupils in a given high school district; it is plain this difference must be made good by levying and collecting taxes on the property of the taxpayers resident in the school district, and this difference cannot be collected from taxpayers of the whole county. Then the taxpayers within the school district will pay a greater proportion of these taxes than would those residing within the county, but outside the school district, and while the valuation of the property of those within the school district and those without it might be uniform, yet the rate of taxation, for the same purpose, would be higher on the property within than upon that without the school district. Again, assume that the seventy-five cents per week exceeds the cost of tuition of such nonresident pupils; then the excess would accrue to the high school districts, and the taxpayers thereof would profit at the expense of those outside the limits of the high school district, and, in either case, the rule of uniformity prescribed in section 6 of said article of the constitution ¹⁵⁵ would be violated; indirectly, perhaps, but it would be violated.

It is argued that section 1 of the article of the constitution under discussion relates to uniformity of valuation only, and not to uniformity of rate of taxation. If that be true, then the provisions confer a barren right only, for the legislature could, under such construction, authorize municipal corporations to levy a higher rate of tax for a given purpose upon one subdivision of the corporation and a lower rate on other subdivisions, whereby some of the subdivisions, while their property might be uniform in valuation with all other subdivisions, would yet pay a much greater proportion of the taxes so levied. We are not disposed to so construe this section, but believe that it was intended, particularly when construed in connection with section 6, that for the same municipal purposes, the rate, as well as the valuation, should be uniform, and that is not within the province of the legislature to evade the inhibition either directly or indirectly: Cooley on Taxation, 1st ed., 133. The high school district and all other portions of the country are, for the purposes of this act, an integral whole, such districts being a portion thereof, and, giving effect to either of the assumptions above made, we would say that it clearly comes within the constitutional inhibitions named.

We quite agree with counsel for plaintiff that, under this act, the county is the proper unit of taxation; but we have already shown that, in event the cost of tuition should exceed or fall below the amount provided by section 3 of the act to be raised by taxing the property of the whole county, it would indirectly violate the rule of uniformity prescribed in section 6 of the article of the constitution named. It would also violate section 4 of said article, as an advantage would accrue to the taxpayers resident in the one or the other of the two portions of the county affected thereby, and it would clearly be a commutation of the taxes to be paid by the taxpayers resident in the one or the other of the two localities. It ¹⁵⁶ may be true that such commutation would be brought about indirectly, that is, in case the cost of tuition exceeded the amount provided to be paid by the general tax upon the whole county, the taxpayers resident within the school district would be compelled to supply the deficiency by another levy upon the property within such district, whence it would follow that the difference would be a commutation in favor of those portions of the county outside the district; or, in case the cost of tuition should fall below the specified amount, the taxpayers within the limits of the district would profit at the expense of those without its limits; and it is clear that in

either event a commutation of taxes would result. The cases stated are, of course, only assumptions, but they are the natural result of the system sought to be inaugurated by the act in question. It would seem clear and convincing that the act violates the provisions of the constitution cited, in the respects named, and that legislation of the character of the act in question cannot be upheld by the court: *Clother v. Maher*, 15 Neb. 1, 16 N. W. 902; *Turner v. Althaus*, 6 Neb. 54; *State v. Poynter*, 59 Neb. 417, 81 N. W. 431; *State v. Graham*, 17 Neb. 43, 22 N. W. 114; *Union Pac. Ry. Co. v. Saunders County*, 7 Neb. 228.

It is not deemed necessary to consider whether the fact that under this act the taxpayers of such districts are compelled to pay the whole of the expense of educating pupils resident in such district, and in addition thereto the proportion of the expense of educating nonresident pupils, affects the question of the constitutionality of the act; for, in our view, the act contains sufficient objections outside of this to render it invalid, and a discussion of this question would seem unnecessary. It is not doubted that, in a proper case, double taxation may be constitutional, and that taxation of overlying districts may also, in a proper case, be unobjectionable, so far as constitutional provisions are concerned; but it is not deemed necessary to enter into a discussion of this question at this time.

¹⁵⁷ For the reason named, the judgment of the lower court is right and is affirmed.

TAXES MUST BE EQUAL AND UNIFORM upon all persons and property *Maudlin v. City Council*, 42 S. C. 233, 46 Am. St. Rep. 723, 20 S. E. 842. The taxing power of a state cannot be made the means of levying taxes upon a portion of a class of citizens, and of bestowing the tax so levied upon a small fraction of the citizens of the state: *Henderson v. London etc. Ins. Co.*, 135 Ind. 23, 41 Am. St. Rep. 410, 34 N. E. 565.

STATE v. BEE PUBLISHING COMPANY.

[60 Neb. 282, 83 N. W. 204.]

CONTEMPT—COERCION OF COURT—NEWSPAPER ARTICLES.—Every litigant is entitled not only to a just decision, but to a decision by a court altogether free from the suspicion of having been coerced, and a newspaper article which may have a tendency to influence the decision of the court is a constructive contempt.

CONTEMPT—NEWSPAPER ARTICLES—CONTROL OF COURT.—The press, the public, and individuals have the right to discuss, criticise, and censure the decisions of the courts, but they have no right to subject the court to any form of coercion with a view of affecting its judgment in a pending case, and such action is a constructive contempt.

CONTEMPT—NEWSPAPER ARTICLES.—A newspaper company deliberately seeking to influence the decision of a court by the publication of articles threatening the judges thereof with public odium and reprobation in case they decide a pending case in a certain way is guilty of a constructive contempt.

W. D. Oldham, deputy attorney general, and C. J. Smyth, attorney general, for the state.

E. Rosewater and E. W. Simeral, for the respondent.

293 SULLIVAN, J. This proceeding for contempt, instituted by the attorney general at the request of the court, is based upon certain newspaper articles relating to the case of *State v. Kennedy*, 60 Neb. 300, 83 N. W. 87, which was, at the time of the publications, pending before us for decision. The defendant is a corporation engaged in the publication of a newspaper which has a general circulation throughout the state. The editor is Edward Rosewater, who has also been cited to show cause why he should not be punished for contempt, and who has, at his own request, been awarded a separate trial. Some of the articles were obviously designed to prevent one member of the court from participating in the decision, while others threatened two members of the court with public odium and reprobation in case they should give judgment in favor of the state. One article, which was entitled "Worthy of Serious Consideration," after declaring that Judge Holcomb, before coming to the bench, had expressed an opinion upon the question involved in the *Kennedy* case, proceeds as follows: "Having prejudged the case, Judge Holcomb must certainly realize that it would be in conflict with the spirit, if not the letter, of the constitution and the laws for him to use his judicial position to

sustain himself in his former declarations. To set the precedent by participating in this case, after having formed and expressed an opinion, would lower the standard of the tribunal in which impartial and equal justice is expected to be administered and whose unbiased interpretation of the constitution is the bulwark of our free institutions." Soon afterward the following article appeared: "Fusion ward heelers in Omaha are again giving advance tips to the effect that the fusion judges of the supreme court will hand down a decision at their sitting two weeks from next Tuesday, ousting the present fire and police commissioners and seating the pretended board appointed by Governor Poynter. Has it not come to a pretty pass ²⁹⁴ when supreme court decisions are retailed in this manner?" A little later there was published an article entitled "Politics in the Courts" (reprinted from the "Grand Island Journal"), which is as follows: "It is reported that the fusionists in Omaha are preparing to profit by the action of the fusion supreme court when it reverses the ruling of the court in the fire and police commission case. If Judges Sullivan and Holcomb lend their aid to the scheme of the Omaha bunco steerers, they will be a disgrace to the legal profession and the laughing-stock of every lawyer in the land. It is to be hoped that the fusion members of the supreme court will prove more manly than their heelers at the metropolis would have them be." Another article, entitled, "The Ethics of Justice," published May 8, 1900, is too long for insertion in this opinion, but its character is sufficiently indicated by the following excerpt: "A due appreciation of the sacred duties of the judicial office and the inviolable right of every citizen to speedy and impartial justice should counteract all pressure of political partisans anxious to use the judicial ermine to cloak their schemes for political power and preferment. If it does not, then Nebraska's motto, 'Equality before the law,' becomes a delusion and a snare." Defendant appeared in court by counsel and defended the accusation against it upon the grounds: 1. That no disrespect to the court, or to any member of the court, was intended; 2. That the case of *State v. Kennedy* was not pending; and 3. That the publications were made with good motives, and were not calculated to obstruct the due administration of justice.

The Kennedy case was pending; of that we have judicial knowledge, and the defendant must surely have known that the case was in court and undetermined, for it appears that the attorney for the respondents brought his brief to Mr. Rose-

water's office, and that the article headed "Worthy of Serious Consideration" immediately followed the meeting between the editor and the lawyer. It also ²⁹⁵ appears from the evidence that the article was written for the express purpose of calling public attention to the alleged impropriety of Judge Holcomb participating in the decision of the court. The first and third defenses are puerile. They amount only to a denial that the defendant intended to violate the law. Under the conceded facts the course pursued by it was indefensible; its conduct is not susceptible of an innocent construction. The statute declares that any willful attempt to obstruct the proceedings, or hinder the due administration of justice in any suit, proceeding, or process pending before any court shall constitute a criminal contempt and be punishable as such: Code Civ. Proc., sec. 669. This statute is merely declaratory of the law as it has existed for hundreds of years. It is a legislative recognition of the authority of the courts to deal in a summary manner with persons who do any wanton, deliberate, or intentional act calculated to embarrass them in the discharge of their important duties. In the history of American jurisprudence there can be found no case in which this power has been harshly or oppressively exercised by a court of final jurisdiction. Indeed, such courts have not often called publishers to account for constructive contempts, because it has rarely happened that a public journal wielding any considerable influence has deliberately employed outlaw methods in attempting to control judicial action. The exceptional cases which we have examined are these: *People v. Stapleton*, 18 Colo. 568, 33 Pac. 167; *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528; *In re Hughes*, 8 N. Mex. 225, 43 Pac. 692; *State v. Morrill*, 16 Ark. 384; *State v. Faulds*, 17 Mont. 140, 42 Pac. 285; *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257.

Cases of this kind originating in the lower courts are very numerous. We will not take the time to cite them or any of them. As said by the supreme court of Iowa in the case of *Field v. Thornell*, 106 Iowa, 7, 15, 68 Am. St. Rep. 281, 75 N. W. 688, it seldom happens "that an honorable journalist so far forgets his self-respect as to trespass upon the rights of the judiciary, or seek to control or improperly influence its conclusions." ²⁹⁶ We have, of course, no desire to restrain, in the slightest degree, the freedom of the press or to maintain the dignity of the court by inflicting penalties on those who may assail us with defamatory publications. Our decisions and all

our official actions are public property, and the press and the people have the undoubted right to comment on them and criticise and censure them as they see fit. Judicial officers, like other public servants, must answer for their official actions before the chancery of public opinion; they must make good their claims to popular esteem by excellence and virtue, by faithful and efficient service, and by righteous conduct. But while we concede to the press the right to criticise freely our decisions when made, we deny to any individual or to any class of men the right to subject us to any form of coercion with the view of affecting our judgment in a pending case.

In the Iowa case above cited it is said: "Courts are constantly passing on questions affecting the life and liberty of the citizen, as well as the rights of property; and the freedom of the judiciary to investigate and decide is quite as important to the well-being of society as the freedom of the press." "Men," said one who knew them well, "are flesh and blood and apprehensive." Few stand unmoved by the clamor of the multitude. Various motives, of course, conspire to make people deny, and even to disguise from themselves, the fact that they are amenable, in any degree, to the force of popular opinion. But it is folly to deceive ourselves, and it is futile to attempt to deceive others. Threats of public clamor have before now swayed the judgments and flexed the purposes of resolute men; and it will be well to remember that what has happened may recur. Men have in the past yielded to the demands of an angry populace, and it is quite possible that they may yield again. Moral fiber is not stronger now than it ever was before. Courts are charged with the function of administering justice, and it is their duty not only to give to every suitor his demandable ²⁹⁷ right, but to give him assurance that no banned and hostile influence shall operate against him while his cause is under consideration. A litigant is entitled not only to a just decision, but to a decision altogether free from the suspicion of having been coerced. Nothing else will satisfy him; nothing less can fill the measure of his expectations. He has no standard with which to gauge judicial firmness; and if the court has been exposed to influences calculated, as in the Kennedy case, to tell against him, he will not know whether an adverse decision is the voice of the law or an echo of the mob. Our views upon this matter are well expressed in the following excerpt from the opinion of Lawrence, C. J., in *People v. Wilson*, 64 Ill. 214,

16 Am. Rep. 528: "A court will, of course, endeavor to remain wholly uninfluenced by publications like that under consideration, but will the community believe that it is able to do so? Can it even be certain in regard to itself? Can men always be sure of their mental poise? A timid man might be influenced to yield, while a combative man would be driven in the opposite direction. Whether the actual influence is on one side or the other, so far as it is felt at all, it becomes dangerous to the administration of justice. Even if a court is happily composed of judges of such firm and equal temper that they remain wholly uninfluenced in either direction, nevertheless a disturbing influence has been thrown into the council chamber which it is the wise policy of the law to exclude." Equally pertinent are the following remarks of Elliott, J., in *People v. Stapleton*, 18 Colo. 580, 33 Pac. 167: "Judges are human; they are possessed of human feelings; and when accusations are publicly made, as by a newspaper article, charging them directly or indirectly with dishonorable conduct in a cause pending before them and about to be determined, it is idle to say that they need not be embarrassed in their consideration and determination of such cause, they will inevitably suffer more or less embarrassment in the discharge of their duties, according to the nature of the charges and ²⁹⁸ the source from which such charges emanate. When a judge tries and determines a cause in connection with which public charges against his judicial integrity have been published, the public, as well as parties interested, are frequently led by the publication of the charges to distrust the honesty and impartiality of the decision, and thus confidence in the administration of justice is impaired. It is not only important that the trial of causes shall be impartial, and that the decisions of the courts shall be just, but it is important that causes shall be tried and judgments rendered without bias, prejudice, or improper influence of any kind. It is not merely a private wrong against the rights of litigants and against the judges—it is a public wrong—a crime against the state—to undertake by libel or slander to impair confidence in the administration of justice. That a party does not succeed in such undertaking lessens his offense only in degree."

We feel quite sure that the publications here in question have not in the least deterred us from discharging with fidelity our duty in the case of *State v. Kennedy*, 60 Neb. 300, 83 N. W. 87. But they were manifestly intended to overawe and intimidate us. They appear to have been put forth for the purpose of pre-

venting a decision in favor of the state. They were, under the circumstances, palpable acts of journalistic lawlessness, calculated to weaken the independence of the court and destroy confidence in its judgment. To justify them is to deny the supremacy of the law and assert the doctrine of newspaper absolutism. To admit that publishers may promote their interests in pending litigation by resorting to methods not available to others is to strike down our much vaunted principle of "equality before the law," and to declare that journalists, who choose to become malefactors, are a privileged class and entitled as such to go unwhipped of justice. But the law recognizes no such distinction; it never has recognized such a distinction. It accords to publishers no rights but such as are common to all. They have just the ²⁰⁰ same rights as the rest of the community have, and no more: *King v. Root*, 4 Wend. 113, 21 Am. Dec. 102. A distinguished judge has said: "A man who speaks in a newspaper has no greater right than he who speaks out of it. A newspaper is no sanctuary behind which a person can shield himself for breaking the laws of the land."

We have not acted in this case out of any spirit of resentment. Indeed, we have no reason to feel specially aggrieved, for the offensive articles do not charge us, or any of us, with official misconduct. Their natural tendency, however, was to interfere with and obstruct the due administration of justice; and it was the unanimous opinion of the court, when the citation issued, that it was our duty to take notice of them and call the defendant to account. And it is still the judgment of the members of the court who take part in this decision that we acted wisely, and that we could not have ignored the defendant's attempt to coerce our decision without being guilty of a craven faithlessness of duty. Whatever may have been the motive of the publishing company, its conduct was plainly unlawful. The articles in question did not, it is true, bring about a miscarriage of justice in the Kennedy case, but their manifest tendency was in that direction. We cannot escape the conclusion that the necessity for this proceeding has resulted from the fact that the services of the journalist were enlisted by interested parties to press upon the attention of the court, in a very important case, illegitimate arguments—reasons for a decision which, it is well understood, counsel could not, with propriety, advance. The defendant is guilty as charged in the information, and it is the sentence of the court that it pay a fine of five hundred dollars and the taxable costs. It will, however, have leave

to move for a modification of the judgment during the present term upon showing that it has published a fair and truthful account of the cause and occasion for this proceeding.

Since the above was written it has been suggested that the testimony of Edward Rosewater was not intended to ³⁰⁰ be regarded as a part of the proceedings in this case. Granting that, our conclusions must remain unchanged. The guilt of the defendant is conclusively established without considering Mr. Rosewater's testimony.

Norval, C. J., for the reasons heretofore stated by him, having refrained from taking part in the hearing, offered no opinion.

IN THE CASE of *State v. Rosewater*, 60 Neb. 438, 83 N. W. 353, it appeared that Rosewater was the editor-in-chief of the "Omaha Daily Bee," the newspaper whose articles formed the basis of controversy in the principal case, and, as the essential facts in each case are the same, the views expressed and the conclusions reached in the principal case are controlling in the Rosewater case. Hence, the defendant is adjudged guilty of contempt.

CONTEMPTS OF COURT BY NEWSPAPER PUBLICATIONS are discussed in the monographic note to *Percival v. State*, 50 Am. St. Rep. 572-585. Consult, also, *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294, 70 Am. St. Rep. 280, 52 N. E. 445; *Field v. Thornell*, 106 Iowa, 7, 68 Am. St. Rep. 281, 75 N. W. 685. For attacks on courts and judges constituting contempts, see *Meyers v. State*, 46 Ohio St. 473, 15 Am. St. Rep. 638, 22 N. E. 43; *Ex parte Barry*, 85 Cal. 603, 20 Am. St. Rep. 248, 25 Pac. 256.

WATTLES v. COBB.

[60 Neb. 403, 83 N. W. 195.]

CHATTEL MORTGAGE—GROWING CROP—UNCERTAIN DESCRIPTION.—A chattel mortgage on three hundred and forty acres of corn, out of a growing crop of four hundred and twenty-five acres thereof, is void for uncertainty in description, as the mortgaged property is neither uniform in quality nor capable of identification.

Brome & Burnett, for the appellant.

A. C. Abbott, McNish & Oleson, M. C. Jay, and G. T. Graves, for the appellee.

⁴⁰³ SULLIVAN, J. This action was instituted by Gurdon W. Wattles to foreclose six chattel mortgages given to him by Lucius W. Cobb and Larkin B. Cobb. The controversy brought

here for decision is between the plaintiff and the defendant, Frank B. Hutchins, trustee, and relates to certain corn raised in 1895 upon the premises hereinafter described. Wattles claims a lien upon the corn by virtue of a mortgage from the Cobbs, bearing date May 20, 1895, and containing the following description: "40 acres of wheat, 65 acres of oats, 40 acres of barley, 340 acres of corn. All of said crops now growing on lands leased from F. B. Hutchins, trustee, described as follows: N. $\frac{1}{2}$ N. E. $\frac{1}{4}$, Sec. 1, T. 25, R. 5; S. $\frac{1}{2}$ S. E. $\frac{1}{4}$, Sec. 26, T. 26, R. 5; N. E. $\frac{1}{4}$, E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$, N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, and S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Sec. 35, T. 26, R. 5, and S. W. $\frac{1}{4}$, S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, and N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, of Sec. 36, T. 26, R. 5." Hutchins claims title under a bill of sale executed by the Cobbs on May 4, 1895. The bill of sale, according to its terms, transferred four hundred and thirty acres of corn upon the identical land described in plaintiff's chattel ⁴⁰⁴ mortgage. Upon this land there was actually grown in the year 1895 about four hundred and twenty-five acres of corn. Whether there is any infirmity in Hutchins' title we need not determine, for the reason that plaintiff has failed to show any right to, or interest in, the property in dispute. His chattel mortgage, as far as it relates to the corn, is clearly void for uncertainty of description. The corn was not uniform in quality, and there is nothing in the record to indicate what three hundred and forty acres was covered by the mortgage.

To make a valid contract requires a meeting of the minds of the contracting parties. In this case the court cannot say from the evidence that the minds of the mortgagors and mortgagee ever came together so as to create a lien upon any particular corn. We cannot see how the plaintiff could have maintained replevin even against the Cobbs. It would hardly be contended that an agreement to sell three hundred and forty acres out of a tract of four hundred and twenty-five acres would be capable of specific enforcement. Such a contract would not give the purchaser an equitable ownership in any of the land. Neither could the mortgage here in question give the mortgagee a lien upon any specific personalty. Our conclusion, that the description contained in the mortgage, so far as the corn is concerned, was void for uncertainty, is, we think, supported by the following cases: *Price v. McComas*, 21 Neb. 195, 31 N. W. 511; *Wood Mowing etc. Machine Co. v. Minneapolis etc. Elevator Co.*, 48 Minn. 404, 51 N. W. 378; *Souders v. Voorhees*, 36

Kan. 138, 12 **Pac.** 526; **Clark v. Voorhees**, 36 **Kan.** 144, 12 **Pac.** 529; **Pennington v. Jones**, 57 **Iowa**, 37, 10 **N. W.** 274; **Krone v. Phelps**, 43 **Ark.** 350; **Atkinson v. Graves**, 91 **N. C.** 99; **Williamson v. Steele**, 3 **Lea**, 527, 31 **Am. Rep.** 652; **Richardson v. Alpena Lumber Co.**, 40 **Mich.** 203; **Cass v. Gunnison**, 58 **Mich.** 108, 25 **N. W.** 52; **Blakely v. Patrick**, 67 **N. C.** 40, 12 **Am. Rep.** 600; **Stonebraker v. Ford**, 81 **Mo.** 532.

The judgment is affirmed.

MORTGAGE OF CROP—DESCRIPTION.—A mortgage of "one-third of twenty-two acres of wheat situate" in a certain place has been held to describe the property sufficiently: See the monographic note to **Barrett v. Fisch**, 14 **Am. St. Rep.** 246, on the sufficiency of the description of property in chattel mortgages.

PASSUMPSIC SAVINGS BANK v. MAULICK.

[60 **Neb.** 469, 83 **N. W.** 672.]

MORTGAGES — FORECLOSURE — DERIVATION OF POWER TO SELL.—The authority of the sheriff to sell mortgaged real estate under foreclosure proceedings is derived from the decree of foreclosure, and not from the order of sale issued by the clerk of the court.

JUDICIAL SALES—RATIFICATION.—If a judicial sale is made in pursuance of a decree of court, it is the duty of that court to ratify the sale, regardless of irregularities in the process issued by the clerk.

PROCESS — WHEN CURED BY AMENDMENT. — Process defective for want of the seal of the court may be cured by amendment.

SHERIFFS—ACT OF DEPUTY.—A sheriff, or his deputy in his place, is authorized to do any act necessary to carry a decree of court into execution.

C. L. Gutterson, for the appellants.

Kirkpatrick Brothers, for the appellee.

469 SULLIVAN, J. This is an appeal from an order of the district court confirming a sale of real estate made by the sheriff of Custer county in execution of a decree of foreclosure. A reversal is claimed upon two grounds. The order or sale was not issued under the seal of the court, and it is insisted that it was therefore void and did not confer upon the sheriff power to advertise and sell the mortgaged property. Conceding this position to be sound, it does not follow that the order of confirma-

tion should be set aside. The sheriff's authority was not derived from the order of sale, but from the decree. If the sale was made in pursuance of the decree, it was the duty of the court ⁴⁷⁰ to ratify it regardless of irregularities in the process issued by the clerk. The issuance of the order of sale was unnecessary and the infirmity in question was without prejudice to the rights of the appellant: *Rector v. Rotton*, 3 Neb. 171; *Fried v. Stone*, 14 Neb. 398, 15 N. W. 698; *Johnson v. Colby*, 52 Neb. 327, 72 N. W. 313; *Amoskeag Sav. Bank v. Robbins*, 53 Neb. 776, 74 N. W. 261; *Jarrett v. Hoover*, 54 Neb. 65, 74 N. W. 729; *Bristol Sav. Bank v. Field*, 57 Neb. 670, 73 Am. St. Rep. 539, 78 N. W. 254. In the first point of the syllabus to *Johnson v. Colby*, 52 Neb. 327, 72 N. W. 313, it is said: "A decree of foreclosure is sufficient authority in itself for its execution. No order of sale need issue, and if one be issued, a sale made thereunder will not be set aside for formal defects in the order, or for failure of the officer to follow entirely the command of the order, provided he follow the law and the decree." It may be further remarked that the defect in the process was entirely cured by the amendment of it after the sale had been made: *Taylor v. Courtney*, 15 Neb. 190, 16 N. W. 842.

The second objection to the confirmation is that the record is contradictory as to whether the sheriff or his deputy acted in making the appraisal of the property described in the decree. We think it is of no consequence which of them acted. Either was authorized to do any act necessary to be done in carrying the decree into execution: *Nebraska Loan etc. Assn. v. Marshall*, 51 Neb. 534, 71 N. W. 63; *Maginn v. Pickard*, 57 Neb. 642, 78 N. W. 295.

The order of confirmation is affirmed.

JUDICIAL SALE.—JUDGMENTS DIRECTING the sale of land by a sheriff need not be supplemented by a formal order of the clerk of the court in order to give effect thereto: *Bristol Sav. Bank v. Field*, 57 Neb. 670, 73 Am. St. Rep. 539, 78 N. W. 254.

BARKER v. WHEELER.

[60 Neb. 470, 83 N. W. 678.]

JUDGMENTS—RES JUDICATA—SUBSEQUENT APPEAL.

A decision on questions presented to the supreme court in reviewing proceedings of the district court becomes the law of the case, and cannot be re-examined upon a subsequent appeal therein.

OFFICERS—OFFICIAL ACTS—LIABILITY ON BOND.—

If a county judge orders an administrator to pay money into court and the latter does so, and the county judge receives the money, it is, on his part, an official act, and he is liable therefor upon his official bond.

OFFICERS—BONDS—JUDGMENT AGAINST OFFICER AS

EVIDENCE AGAINST SURETY.—A judgment against an officer is prima facie evidence against his sureties when sued upon the officer's official bond for the same cause of action.

OFFICERS—BONDS OF—JUDGMENT AGAINST OFFICER

AS EVIDENCE AGAINST SURETIES.—A judgment against an officer is conclusive evidence of the liability of his sureties when served upon their bond, only in case they agree to abide by any judgment that may be rendered against their principal.

OFFICERS—OFFICIAL MISCONDUCT—LIABILITIES OF

SURETIES.—An officer who receives money in his official capacity and converts it to his own use is guilty of official misconduct, for which the sureties on his official bond are liable.

OFFICERS—OFFICIAL MISCONDUCT—EVIDENCE OF

DATE OF.—In an action against sureties on an official bond for money embezzled by their principal during his term of office, evidence to show the date of the embezzlement is admissible under a general denial.

E. J. Cornish, for the appellants.

I. Adams, for the appellee.

⁴⁷¹ SULLIVAN, J. This proceeding in error brings here for review a judgment of the district court in favor of Bert Glendore Wheeler, a minor, and against George E. Barker and William S. Rector. The action was instituted by Miss Wheeler's guardian to recover of the defendants, as sureties upon the official bond of James W. Eller, a sum of money which, it is alleged, Eller received in trust for the plaintiff, and converted to his own use while acting ⁴⁷² as judge of the county court of Douglas county. After stating that the money in question was paid into court by the administrator of the estate of Bert G. Wheeler, deceased, in pursuance of an order of the court, and that such money belonged to the plaintiff, and was received by Eller as county judge, the petition charges "that said Eller wrongfully, fraudulently, and corruptly, and in gross violation

of his duties as such county judge, after having obtained possession of said funds as aforesaid, thereafter converted said sum of nineteen hundred and thirty-five dollars and ninety-two cents, the amount belonging to this plaintiff, to his own use, and that ever since said date, said Eller has retained all of said last-mentioned sum, save four hundred and eighty-five dollars and ninety-two cents, though payment thereof has been frequently demanded by plaintiff's guardian." The defendants answered, admitting that the plaintiff was an infant, that Eller was county judge of Douglas county during 1892 and 1893, and that they were sureties upon his official bond. The other averments of the petition were denied in general terms.

The first contention of defendants is that the money which Eller was charged with having converted to his own use was not received by him in his official capacity, and that, therefore, the misappropriation of it did not constitute a breach of his official bond. This precise question has been already considered and decided by this court in this case. By the former decision it is settled, so far as this litigation is concerned, that "where a county judge orders an administrator to pay money into court and the latter does so and the county judge receives the money, it is, on his part, an official act, and he is liable therefor upon his official bond": *Wheeler v. Barker*, 51 Neb. 846, 71 N. W. 750. The doctrine thus declared appears to be sound. At any rate it is the law of the case and will not be re-examined at this time: *Ripp v. Hale*, 45 Neb. 567, 64 N. W. 454; *Coburn v. Watson*, 48 Neb. 257, 67 N. W. 171; *Omaha Life Assn. v. Kettenbach*, 55 Neb. 330, 75 N. W. 827; *Hayden v. Frederickson*, 59 Neb. 141, 80 N. W. 494; *Home Fire Ins. Co. v. Johansen*, 59 Neb. 349, 80 N. W. 1047.

To show that Eller had converted the plaintiff's money ⁴⁷³ there was produced at the trial and received in evidence the record of a decree rendered by the district court of Douglas county in an action brought by the plaintiff against Eller alone. The sureties contend that the judgment against their principal is not admissible against them and does not tend to establish their liability, while the guardian insists that it is not only competent, but indisputable proof. We think the record was sufficiently identified; that it was properly received and that it constituted *prima facie* evidence of the alleged conversion. In *Fire Assn. of Philadelphia v. Ruby*, 49 Neb. 584, 68 N. W. 939 it was held that a judgment of amercement against an officer is *prima facie* evidence against his sureties when sued upon

their bond. This decision seems to be supported by the preponderance of adjudged cases and it will be adhered to. *Graves v. Bulkley*, 25 Kan. 249, 37 Am. Rep. 249, *Fay v. Edmiston*, 25 Kan. 439, *Lipscomb v. Postell*, 38 Miss. 476, 77 Am. Dec. 651, *Charles v. Hoskins*, 14 Iowa, 471, 83 Am. Dec. 378, *Stephens v. Shafter*, 48 Wis. 54, 33 Am. Rep. 793, 3 N. W. 835, *Beauchaine v. McKinnon*, 55 Minn. 318, 43 Am. St. Rep. 506, 56 N. W. 1065, *Norris v. Mersereau*, 74 Mich. 687, 42 N. W. 153, *Thomas v. Markmann*, 43 Neb. 823, 62 N. W. 206, and *Lewis v. Mills*, 47 Neb. 910, 66 N. W. 817, holding that such a judgment is conclusive upon the sureties, appear to be, in part at least, based upon *Pasewalk v. Bollman*, 29 Neb. 519, 26 Am. St. Rep. 399, 45 N. W. 780, which merely decides that a surety who agrees to pay any judgment that may be recovered against his principal must, in the absence of fraud or collusion, abide by his contract. That the court in the last-mentioned case clearly recognized the distinction between agreements of sureties to be bound by judgment against their principals and general undertakings to answer for official misconduct is shown by the following statement in the opinion: "In the case of most official bonds the sureties do not promise to pay any judgment rendered against the principal, hence a judgment against the official on such a bond is not conclusive upon the sureties where the latter had no notice of the suit." The defendants in the present case did not agree to satisfy any judgment that might be recovered against their principal. Their undertaking ⁴⁷⁴ was, in general terms, that he would perform his official duty. Upon the question of whether he had been guilty of misconduct in office, they were entitled to be heard. It is contrary to natural justice that they should be concluded by a judgment to which they were not parties, and by which they did not agree to be bound. While *Thomas v. Markmann*, 43 Neb. 823, 62 N. W. 206, and *Lewis v. Mills*, 47 Neb. 910, 66 N. W. 817, are not without the support of respectable authority, we are of opinion that they extend the liability of the surety beyond the terms of his agreement and disregard entirely the strict rule of construction applicable to such contracts. To the extent that those cases are in conflict with *Fire Assn. of Philadelphia v. Ruby*, 49 Neb. 584, 68 N. W. 939, they are overruled.

A further contention of defendants is that the evidence given at the trial does not establish a breach of the condition of the bond in suit. We think it does. The petition alleged that El-

ler, as county judge, received the plaintiff's money, and afterward converted it to his own use. The answer merely denied this charge it did not plead payment or accord and satisfaction. If Eller received the money and misappropriated it during his term of office, or failed to turn it over to the proper person at the close of his term, he was guilty of official misconduct. The decree in the case brought by the plaintiff against Eller alone was rendered on December 18, 1897, and is based in part upon the following findings:

"2. That on the twenty-ninth day of March, 1892, said defendant, while acting as judge of said court, and as such court and judge thereof, obtained possession of the sum of nineteen hundred and thirty-five dollars and nineteen cents, belonging to plaintiff, said money being inherited by plaintiff from her deceased father, Bert G. Wheeler, whose estate was then in process of settlement in said county court.

"3. That of said money the sum of fourteen hundred and fifty dollars, defendant, ever since said last-mentioned date, has failed, neglected, and refused to pay to the guardian of plaintiff, or any part thereof."

475 These findings show that Eller received the plaintiff's money by virtue of his office, and that he retained the greater portion of it after he ceased to be county judge. According to these findings, Eller must have been guilty of conversion on or before January 3, 1894. It was lawful for him, as judge of the county court, to receive the money, but it was not lawful for him to retain it after the expiration of his official term. The evidence on the part of the plaintiff conclusively established a conversion, and, the defendants having failed to plead or prove anything in avoidance, the only controverted question was the amount of their liability. While there is evidence in the record tending to prove that Eller obtained the plaintiff's money with intent to cheat and defraud her, it is not certain that he actually appropriated any part of such money to his own use before the end of his term. The defendant offered to show that there was no default on the part of their principal prior to January 4, 1894, but the trial court rejected the evidence on the theory that the decree against Eller fixed indisputably the liability of his sureties and the extent of such liability. The proffered evidence should have been received; it was error to exclude it. Notwithstanding this error, the plaintiff was entitled on May 11, 1899, the day the verdict was returned, to a judgment for nineteen hundred and eighty-five dollars and thirteen cents; and the

judgment for that amount with interest will be affirmed if there be a remission of the excess within sixty days. In case the plaintiff does not file a remittitur for such excess with the clerk of this court within the time aforesaid, the judgment will be reversed.

Judgment accordingly.

SURETYSHIP.—JUDGMENTS AGAINST PRINCIPALS as evidence against their sureties are discussed in the monographic note to *Charles v. Hoskins*, 83 Am. Dec. 380-390. For authorities holding such judgments conclusive against the sureties, see *Cross v. White*, 80 Minn. 413, 81 Am. St. Rep. 267, 83 N. W. 393; *Pasewalk v. Bollman*, 29 Neb. 519, 26 Am. St. Rep. 399, 45 N. W. 780. In *Beauchaine v. McKinnon*, 55 Minn. 318, 43 Am. St. Rep. 506, 56 N. W. 1065, it is held that a judgment recovered against the principal on an official bond is *prima facie* evidence against the sureties in an action on their bond.

COMMONWEALTH MUTUAL FIRE INSURANCE COMPANY v. HAYDEN.

[60 Neb. 636, 83 N. W. 922.]

INSURANCE.—RECITALS IN POLICIES OF INSURANCE which are not contractual elements thereof are not conclusive on the parties thereto.

CONTRACTS CONTRAVENING THE ESTABLISHED POLICY of the state cannot be enforced in the courts thereof.

INSURANCE—FOREIGN CORPORATION—CONTRACTS OF—FAILURE TO COMPLY WITH LAWS.—A foreign insurance company doing business in a state without complying with, and in defiance of, its laws, cannot insist that its courts must, as an exercise of comity, give effect to its contracts made with citizens of the state.

CORPORATIONS—JUDGMENT AGAINST STOCKHOLDER—SERVICE OF PROCESS.—A stockholder in a corporation is concluded by a judgment against him in an action against the corporation to enforce a corporate obligation, although he is not a party to the suit as an individual, but only through representation by the corporation upon the theory that, though not personally served with process, he is before the court as an integral part of the corporation and represented by it.

INSURANCE.—MEMBERSHIP in a mutual insurance company ceases with the expiration of the member's policy, and payment of the liabilities incurred while the policy was in force. Jurisdiction of such company does not include jurisdiction over ex-members who are not in fact indebted on account of policies once held by them.

JUDGMENTS OF SISTER STATES—PLEADING AND EVIDENCE IN ACTIONS ON—JURISDICTION.—In an action in one state on a judgment of a court of a sister state, the defendant

may plead and prove that such court had no jurisdiction to render such judgment but the burden is upon him to show such want of jurisdiction.

R. S. Horton, for the appellant.

T. J. Mahoney, for the appellee.

637 SULLIVAN, J. The Commonwealth Mutual Fire Insurance Company, a Massachusetts corporation, issued two fire insurance policies to Hayden Brothers, insuring property owned by them and in their possession at Omaha, in this state. After one of the policies had expired, but while the other was in force, the company became insolvent and passed into the hands of a receiver, who brought this action to recover assessments made against the defendants for the purpose of paying losses and liabilities incurred. The district court held, on demurrer to the petition, that the facts pleaded did not constitute a cause of action, and gave judgment accordingly. Counsel for plaintiff contends for two propositions: 1. That the contracts were made in Massachusetts; that they are valid in that state, and therefore enforceable in this; 2. That the assessments were made by a court of general jurisdiction in the domicile of the corporation, and that the amounts charged against defendants and their obligation to pay the same are established by a valid adjudication.

Notwithstanding the recitals of the policies indicating that they were issued by the company's Omaha agency, we think it clear that the averment of the petition, that they were executed in Massachusetts, must be taken as true. The recitals are not contractual elements, and consequently are not conclusive upon the plaintiff. It has, in effect, alleged that they are false, and no reason 638 is perceived why that allegation may not be sustained by proof: 1 Greenleaf on Evidence, 15th ed., sec. 285. But whether these contracts were made in Massachusetts or Nebraska, they contravene the policy of this state, and could not be enforced by action in our courts. The statute prescribing the conditions upon which foreign insurance companies may do business here is a police regulation designed to protect our people against irresponsible insurers. It forbids them to do any insurance business, directly or indirectly, in this state until they have complied with its terms; and the principle of judicial comity does not require our courts to actively aid in the enforcement of contracts which interfere with, and tend to frustrate, the policy established by the legislature: *Rose v. Kimberly etc. Co.*, 89 Wis. 545, 46 Am. St. Rep. 855, 62 N. W. 526; *Cowan v. Lon-*

don Assur. Corp., 73 Miss. 321, 55 Am. St. Rep. 535, 19 South. 298; *Seamans v. Temple Co.*, 105 Mich. 400, 55 Am. St. Rep. 457, 63 N. W. 408; *Seamans v. Zimmerman*, 91 Iowa, 363, 59 N. W. 290; *Chicago etc. Ry. Co. v. Gardiner*, 51 Neb. 70, 78, 70 N. W. 508. The company, having engaged in business in this state without authority and in defiance of the policy of our laws, is not now in a position to insist that our courts should, as an exercise of comity, give effect to its contracts. The defendants agreed to pay all lawful assessments made against them. This agreement was valid in Massachusetts, but will not support an action here. These remarks dispose of plaintiff's first contention.

The claim that the amounts of the assessments and the liability of the defendants to pay them are unalterably fixed by the decree and orders of the supreme judicial court of Massachusetts raises a question of jurisdiction which will be now considered. In *Hawkins v. Glenn*, 131 U. S. 319, 329, 9 Sup. Ct. Rep. 739, it was held: "The stockholder is bound by a decree of a court of equity against the corporation in enforcement of a corporate duty, although not a party as an individual, but only through representation by the company. A stockholder is so far an integral part of a corporation that, in view of the law, he is privy to the proceedings touching the body of which ⁶³⁹ he is a member." The rule thus laid down by the supreme court of the United States has been generally adopted by other courts (*Glenn v. Williams*, 60 Md. 93; *Mutual Fire Ins. Co. v. Phoenix Furniture Co.*, 108 Mich. 170, 62 Am. St. Rep. 693, 66 N. W. 1095; *Lycoming Fire Ins. Co. v. Langley*, 62 Md. 196; *Langworthy v. Garding*, 74 Minn. 325, 77 N. W. 207; *Parker v. Stoughton Mill Co.*, 91 Wis. 174, 51 Am. St. Rep. 881, 64 N. W. 751; *Howard v. Glenn*, 85 Ga. 238, 21 Am. St. Rep. 156, 11 S. E. 610), and is not questioned by the learned counsel for defendants. He concedes that the Massachusetts court had authority to make an adjudication binding upon the stockholders of the company without service of summons or other jurisdictional process upon them; but he insists that his clients were not stockholders when the assessments were made, nor at the time the liabilities were incurred upon which the assessments are founded. The petition shows that the policies issued to Hayden Brothers had expired before the assessments in question were made by the directors or confirmed by the court; and it fails to show that such assessments were made to meet losses or expenses incurred during the life of either policy. The allega-

tions with respect to the assessments and the purposes for which they were made are as follows:

"6. And the plaintiffs aver that not being possessed of cash funds sufficient for the payment of incurred losses and expenses, and in pursuance of the decree of the supreme judicial court for the county of Suffolk, commonwealth of Massachusetts, sitting in equity, in accordance with sections 47 and 49 of chapter 522 of the acts of 1894 of the commonwealth of Massachusetts, on the seventh day of March, 1896, the directors ordered and made an assessment of two hundred and fifty thousand dollars upon its members liable to assessment, which said assessment was subsequently ratified, confirmed, and established by decree of said court, dated March 25, 1896; that afterward said assessment was computed and made up against those who had taken policies from said plaintiff company who were liable thereto, including said defendant, and was further ratified, confirmed, and established as so computed and ⁶⁴⁰ made up upon the persons and for the amounts as appear in the schedule annexed to the decree of said court dated December 9, 1896, by which it appears that defendant was assessed upon said policy for the amount of one hundred and five dollars and fifty-five cents, the same being the portion of its assessment on said policy.

"7. Said decree was duly rendered, and said orders were duly made by said supreme judicial court in said action, in which George S. Merrill was complainant, and said plaintiff company was defendant, said supreme judicial court having jurisdiction both of the parties and the subject matter of said action. Said decree remains in full force and effect, and the assessment against said defendant so ratified by said decree remains unpaid."

The theory upon which a stockholder is held to be concluded by a judgment rendered against him in a suit brought to enforce a corporate obligation is that, although not personally served with process, he is before the court as an integral part of the corporation; that the corporation represents him, and that he is, as was said in *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. Rep. 739, "privy to the proceedings touching the body of which he is a member." Assuming that the Massachusetts laws in regard to mutual insurance companies are like our own, it seems clear that membership in such a company ceases with the expiration of the member's policy and the payment of his share of the liabilities incurred while the policy was in force. If the member

owes nothing on account of his policy and the policy has expired, the corporation is no longer authorized to represent him in court. Jurisdiction of the corporation does not include jurisdiction of ex-members who are not in fact indebted on account of the policies which they once held. And it seems equally plain that a court, in such case, cannot invest itself with jurisdiction by declaring that it has it, or by finding jurisdictional facts which do not actually exist. The Massachusetts court could not make a conclusive adjudication by finding that the assessments which it ratified were based on ⁶⁴¹ losses or expenses incurred during the time defendants were policy holders. That would be concluding them by an adverse decision upon an issue which they had no opportunity to contest. The conclusiveness of the judgment depends upon the correctness of one of the findings upon which it rests. But while there can be no doubt about the right of defendants in this action to show that the assessments were not based on liabilities incurred during the period of their membership, and that the judgment pleaded is, therefore, void for want of personal jurisdiction, we think the petition is not defective for failing to allege the facts showing that the court acted within the limits of its authority. It was not for the plaintiff to show the existence of the jurisdictional facts; they should be presumed; it was for the defendants to show their nonexistence: *Savin v. Bond*, 57 Md. 228; *Lowe v. Lowe*, 40 Iowa, 220; *Bissell v. Wheelock*, 11 Cush. 277; *Leach v. Linde*, 70 Hun, 145; 24 N. Y. Supp. 176; affirmed in 142 N. Y. 628, 37 N. E. 565. In *Council Bluffs Sav. Bank v. Griswold*, 50 Neb. 753, 757, 70 N. W. 376, it is said: "It will, upon reason and authority, be presumed, in the absence of proof to the contrary, that courts of general jurisdiction of other states possess the authority they presume to exercise, and that the methods of procedure pursued by them, although differing from the established practice in this state, are authorized by the laws of the states in which they act."

The judgment is reversed and the cause remanded for further proceedings.

A FOREIGN INSURANCE CORPORATION, prohibited by statute from doing business in a state without first complying with certain conditions and regulations, cannot maintain an action therein on a contract of insurance without compliance with such conditions: *Note to Garratt Ford Co. v. Vermont Mfg. Co.*, 78 Am. St. Rep. 855.

A JUDGMENT AGAINST A CORPORATION binds the stockholders: *Ball v. Reese*, 58 Kan. 614, 62 Am. St. Rep. 638, 50 Pac. 875; *Nickum v. Burekhardt*, 30 Or. 464, 60 Am. St. Rep. 822, 47

Pac. 788, 48 Pac. 474; *Singer v. Hutchinson*, 183 Ill. 606, 75 Am. St. Rep. 133, 56 N. E. 388.

IN AN ACTION ON A FOREIGN JUDGMENT, the jurisdiction of the court that rendered it is open to inquiry: *Ferry v. Miltimore* etc. Works, 71 Vt. 457, 76 Am. St. Rep. 787, 45 Atl. 1035.

KERNER v. McDONALD.

[60 Neb. 663, 84 N. W. 92.]

ESTATES BY ENTIRETY as they existed at common law do not exist in Nebraska. On the contrary, a husband and wife are now considered as equals, the relation as a dual equality, and the conveyance of land to them does not create an estate in entirety.

McCoy and Ohnstead, for the appellants.

N. C. Pratt and E. M. Wellman, for the appellees.

669 **NORVAL, C. J.** This case involves the question of whether, in this state, the doctrine of entirety of estate is in force. This law grew out of the relation of husband and wife, as the same existed at common law, and it was a necessary corollary of that statute; for, at common law, the moment a woman married she ceased to exist as an entity, but simply became merged in her husband, and came wholly under his dominion. Of course, if at marriage she ceased to exist as an entity, she lost the ability to own anything; hence out of this legal fiction, of necessity, arose the doctrine, that if there be granted by one instrument to two persons, who are husband and wife, an estate, it is owned by both of them, not by moieties, but as a whole, and will on the death of one belong, as if from the date of the grant, wholly to the survivor. We will discuss the questions thus presented as if no statutory enactment ever existed **670** on the subject other than chapter 15 of the Compiled Statutes, whereby it is provided that so much of the common law as is applicable, and not inconsistent with the constitution of the United States, etc., is adopted and declared to be the law within the state. Is the law of entireties applicable in this state? In other words, is it in harmony with the marriage relation as it now exists? It is urged that the whole of the common law exists by force of this statute, except where it has been expressly changed by legislative enactment, unless it be inconsistent with the constitution of the United States, the

organic law of the territory (and presumably of the constitution of the state). With this statement we cannot agree, for the term "as is applicable" has also a meaning, and it is evidently intended to mean so much as is applicable to our institutions. Now, it is evident that the whole of the common law of husband and wife is not now and never has been in force in this state. Take, for instance, that common-law rule whereby the husband was, under certain circumstances, permitted to inflict corporal punishment upon his wife. It would hardly be contended that such rule of law existed here, in the absence of special statutory enactment. The principle is too repugnant to all modern ideas of the relation of husband and wife to have a place in our jurisprudence. Hence, it is plain that not all common law of England is in force in this state. We do not imagine that such would be declared to be the law anywhere; yet it was once, without dispute, the common law of England. As a matter of fact, law is not a fixed science, but advances or retrogrades with the advancement or retrogression of society; and the law permitting corporal punishment of the wife by the husband has ceased, because we are a more highly civilized people than were our ancestors, and such a thing would now be looked upon with abhorrence by all right-thinking men. Many principles of law have changed with the passing of time, through the gradual change of thought on the part of society and ⁶⁷¹ the flux and change of social organization; many others have ceased because the reason which called them into existence has ceased, and it seems to us that to this last-named principle may be referred the law of estates by entirety. The old common-law idea of the oneness in the relation of husband and wife is fast disappearing. The identity of the woman is not lost in her husband; she is no longer under his dominion or control. On the contrary, in law, husband and wife are now considered as equals, the relation as a dual equality, not as one, and that one very much the husband. Hence, there seems to be no better reason for holding that a conveyance of an estate to two persons, they being husband and wife, by one instrument, creates an estate in entirety, than to hold that the conveyance of an estate to two persons not husband and wife will create a like estate, and not an estate. The reason for the law of entirety having ceased, with the reason, the law itself is no more. It would seem clear that, taking the modern view of the marriage relation, there is no reason for the doctrine of estates in entirety, but that estate created in both husband and wife should at once be assimilated

to like estates created in other persons not husband and wife. We are of the opinion that, in the absence of statute declaratory thereof, the doctrine of estates by entirety is repugnant to our institutions, and to the American sense of justice to the heirs, and, therefore, not the common law of this state. The district court having held in harmony with the views herein expressed, the judgment is accordingly affirmed.

ESTATES BY ENTIRETIES.—The rule of the common law, by which a devise or grant of land to a husband and wife constituted them tenants by the entirety, has been changed by statutes enlarging the property rights of married women: Robinson, Appellant, 88 Me. 17, 51 Am. St. Rep. 367, 33 Atl. 652; Donegan v. Donegan, 103 Ala. 488, 49 Am. St. Rep. 53, 15 South. 823.

CHASE v. SWIFT.

[60 Neb. 696, 84 N. W. 86.]

PRINCIPAL AND AGENT—IMPLIED AUTHORITY OF AGENT TO EMPLOY PHYSICIAN.—The general manager and superintendent of a business corporation has no implied authority to employ and furnish medical aid and assistance to a servant of the corporation who has been injured outside the scope of his employment, and the physician cannot recover therefor from the corporation.

Weaver & Giller, for the appellant.

Hall & McCulloch, for the appellee.

697 SULLIVAN, J. Edward W. Chase, a practicing physician of the city of Omaha, brought this action against Swift & Co., an Illinois corporation, to recover for professional services rendered to employes of the defendant who had been injured in some manner during the progress of a strike in the fall of 1894. A jury impaneled to try the cause found, in obedience to a peremptory instruction, that the plaintiff had no cause of action, and judgment was accordingly rendered against him. The judgment is right and must be affirmed. The defendant was the owner of a packing-house, which was being operated under the direction and management of its superintendent, A. C. Foster. The employes upon whom Dr. Chase attended were brought from Kansas City to South Omaha to take places of other employes of the defendant who had gone out on a strike; and the theory upon which the action was prosecuted was that

the superintendent had agreed to take care of any of the new men who should be injured by the strikers in consequence of having engaged in the service of the company. There is some dispute as to what Foster agreed to do, and it is not clear to what extent he was authorized to bind his principal. But resolving all doubts in favor of the plaintiff, we are unable to see that the evidence received, plus the evidence offered and excluded, proved or tended to prove that the defendant was under any obligation to pay for medical services rendered to the wounded men. When, where, or why they were injured does not appear, and hence there is nothing to indicate that Foster was within the scope of his apparent authority, as an agent of the company, in directing plaintiff to give them medical treatment. It is certain that they were not hurt while in the actual service of the defendant, and, there being no proof that they were assaulted by the strikers, or that there was any causal relation between their injuries and the service in which they were engaged, it seems quite clear that it was not within the ⁶⁹⁸ apparent range of Foster's agency to employ a physician to attend them.

The judgment is affirmed.

PHYSICIAN.—A ROADMASTER or a conductor of a railroad corporation has no authority to employ a surgeon to treat an injured employé of the company: *Peninsular R. R. Co. v. Gary*, 22 Fla. 356, 1 Am. St. Rep. 194.

ST. JAMES' ORPHAN ASYLUM v. SHELBY.

[60 Neb. 796, 84 N. W. 273.]

CHARITABLE TRUSTS—ADMINISTRATION OF CY PRES.—In the administration of charitable trusts under the American system of equity jurisprudence, the powers exercised are purely judicial, derived solely from the organic law and the statutes, including the common law. The statute of 43 Elizabeth and the doctrine of administering trusts *cy pres*, or under the prerogative of the king as *parens patriae* by *sign manual*, have no part or place in such administration.

CHARITABLE TRUSTS—ADMINISTRATION OF.—The doctrine of charitable trusts was a part of the common-law jurisdiction of the courts of chancery of England exercising judicial powers only, and as such has been transplanted into the courts of this country possessing common-law equity powers. In the administration and enforcement of charitable trusts, the exercise of the power of the court must be solely judicial.

WILLS—CHARITABLE TRUSTS.—It is competent for a testator to devise property to a trustee with power in him to select or designate the object or objects upon which the charity is to be disposed.

WILLS—CHARITABLE TRUSTS.—COURTS VIEW FAVORABLY donations by will for charitable purposes, and will endeavor to carry them into effect where this can be done consistently with the rules of law.

WILLS—CHARITABLE TRUSTS—INDEFINITENESS.—If a testator creating a trust to a charitable use defines the intention of the trust, and invests the trustee with discretionary power over the application of his bounty to the objects, for the purposes intended, the bequest cannot be held invalid so long as there is no obstacle to the exercise of the power confided to the trustee.

WILLS—CHARITABLE TRUSTS—POWER CONFERRED ON TRUSTEE—INDEFINITENESS.—If ample power is conferred by will upon a trustee to relieve a bequest to charity of all objections arising from its indefiniteness, and no obstacle exists to the exercise of that power, courts cannot interpose to prevent its exercise.

WILLS—CHARITABLE TRUSTS—POWERS CONFERRED ON TRUSTEE.—If, in the creation of a charitable trust, certain and ascertainable trustees are appointed with full power to select the beneficiaries and devise a scheme or plan of application of the funds appropriated to the charitable object, the court will, through the trustees, execute the charity. In such case, the exercise of the power vested in the trustees is deemed to be an expression of the will of the testator.

WILLS—CHARITABLE TRUSTS—POWER OF TRUSTEE. A bequest by will to a charity unnamed, to be selected by the trustee therein named, may be valid, the only limitation being that the object must be a charitable one according to the intention of the testator.

WILLS—CONSTRUCTION—INTENTION OF TESTATOR.—A will must be construed with a view of carrying out the intention of the testator, and unless there is something in it contrary to the law of the state, or in contravention of public policy, no reason exists for declaring it invalid.

WILLS—CHARITABLE TRUSTS—INDEFINITENESS.—If a bequest for a charitable purpose, though entirely general and uncertain in its character, is made to a trustee, who is empowered to select the object of the charity, and who is willing to accept, or has accepted, the trust, the will cannot be declared invalid because of the general nature of the object or objects of the charity.

J. C. Cowin and C. J. Smythe, for the appellants.

G. W. Doane, W. G. Doane, and J. B. Kelkenney, for the appellee.

799 HOLCOMB, J. In the will of Joseph Creighton, deceased, among other provisions, appears the following: "Item. I hereby give and bequeath unto the Rt. Reverend James O'Conner, Bishop of Omaha, if he shall survive me, the following lands situate in the county of Douglas, in said state, that is

to say (description of land follows); if the said Bishop O'Conner do not survive me, then my will is, that the said land shall go to his successor as Bishop of Omaha, my wish and direction is that the said Bishop O'Conner, if he shall survive me, or his said successor as Bishop of Omaha, apply the said lands and the proceeds arising from the same and the sale thereof to some charity, according to his judgment, but I prefer that the same be applied to the establishment or maintenance of an orphanage."

By the terms of the will, the testator sought to dispose of all his property by three separate and distinct provisions. By the first, certain real estate specifically described was devised to his grandchildren, they being the children of the contestant, who is his only daughter and sole heir at law; by the second, in the manner herein quoted; and by the third, he bequeathed all the residue and remainder of his property, both real and personal, to his said daughter, Mary Bridget Shelby, in trust, for her children, or such of them as shall be living at her death, such property being charged with the sum of fifteen dollars a week to be paid by his said daughter for the maintenance and ~~soo~~ support of Mary Furlong, the testator's wife's sister, so long as she may live. The said daughter was nominated as executrix of the will. When it was filed for probate, the daughter withdrew as executrix, and contested the admission to probate and allowance of the will upon different grounds, but mainly because of the alleged incapacity of the testator to make a valid will, the exercise of undue influence, and for the reason the provisions quoted are void for uncertainty and indefiniteness. Upon a hearing of the objections interposed, the will was disallowed, and the probating thereof denied. An appeal was taken to the district court, where a hearing resulted in a disagreement of the jury trying the issues of fact. The other provisions of the will having being amicably arranged by the interested parties, a motion was presented to dismiss the appeal, for the reason that the provisions heretofore quoted rendered the will, as to the property therein mentioned, null and void for indefiniteness and uncertainty, passing nothing thereby to the trustee named. The motion was sustained and the appeal dismissed. From the judgment of dismissal the case is brought here for review.

As thus presented, the sole question involved is as to the validity of the provisions of the will with respect to the disposition, or attempted disposition, of a portion of the property

of the testator for charitable purposes. While some other questions are briefly argued relative to the course of proceeding taken by appellants and plaintiffs in error, we find no reason why the trustee should not be heard in this court. His case, we are disposed to the view, is properly before us for consideration upon the merits of the controversy with respect to that part of the instrument by which the testator sought to apply a part of his property to objects of charity, and this without necessarily determining the status, in this proceeding, of the St. James' Orphan Asylum, which it is claimed has been made the beneficiary under the terms of the will.

801 The first and last of the three provisions heretofore referred to being unobjectionable, and having been eliminated from the controversy so far as the present proceedings are concerned, the litigation has resolved itself into the one proposition as to the force and effect of the second provision of the will, whereby the testator sought to apply the property described to a charitable object. If this provision fails, the property passes to the contestant as the sole heir at law of the testator.

We are indebted to counsel on both sides for their able and learned discussion of the many questions involved, and the intelligent manner in which the subject is presented, as well as the exhaustive research of authorities evidenced by the many citations in the several briefs now before us.

While the plaintiff in error argues from different hypotheses as to the validity of the controverted provisions of the will, we are strongly of the opinion that all must be discarded as unwarranted by the positive language used, and therefore untenable, save the fourth and last one, which we conceive to be the only position which has real and substantial merit to rest upon. The fourth position is, that if a trust is created by the terms of the will, it is for charitable uses, and the fact that the beneficiary or beneficiaries are indefinite and uncertain does not therefore render it void and of no force and effect. On this proposition the contestant takes direct issue, and therein lies, in our judgment, a correct solution of the matter in litigation.

The question is one which, in the beginning, we are constrained to say, is surrounded with difficulties, and regarding which there is much diversity of opinion and an irreconcilable conflict in the authorities adverting to or passing upon the subject. These divergent views, as it occurs to us, are occasioned by a difference of opinion as to the correct doctrine of charitable trusts by devise under the common law, and controlled also,

to some extent, by statutory provisions governing the subject. By ⁸⁰² statute, so much of the common law as is applicable, and not inconsistent with the federal constitution or the laws and constitution of this state, is declared to be the law here. Hence, it becomes of some importance to ascertain what, if any, difference exists between the doctrine of charitable trusts and that of trusts of any other character under the common law. It is admitted that devises for charity, where the beneficiaries were general, indefinite, and uncertain, were enforced by the English courts of chancery; but it is insisted that the power thus exercised was not by virtue of the common-law jurisdiction of such courts, but by specially conferred authority by the statute of 43 Elizabeth, the power and prerogatives of the king as *parens patriæ*, by his sign manual, and the doctrine of *cy pres* which obtained in that country, whereby, if a testamentary gift to charity could not be applied as directed by the testator, it would be applied as nearly as possible, or as closely to the presumed general intention of the donor as expressed in the will. It needs no argument or elaboration to reach the conclusion that, under our system of equity jurisprudence, the powers exercised are purely judicial, derived solely from the organic law and the statutes, including the common law, and that the statute of 43 Elizabeth mentioned, the doctrine of administering trusts *cy pres*, or under the prerogative of the king as *parens patriæ* by sign manual, have no part or place in the administration of the courts, either at law or in equity in this state.

While the earlier opinions of the courts in this country, following *Baptist Assn. v. Hart*, 4 Wheat. 1, held to the doctrine that charitable trusts in England were administered under the provisions of the statute of 43 Elizabeth, and the extraordinary powers above referred to, in the later and more thoroughly considered case of *Vidal v. Girard*, 2 How. 126, a different conclusion was arrived at, and in that opinion it was announced that charitable trusts were administered by the courts of chancery of England exercising ⁸⁰³ their inherent judicial powers only, anterior to and independent of the statute of 43 Elizabeth, upon which their jurisdiction to administer such trusts was in former opinions held to rest. In the *Girard will* case, in which the beneficiaries of the will were of a general, uncertain, and indefinite class, says Mr. Justice Story, who wrote the opinion: "In the next place it is said that the beneficiaries who are to receive the benefit of the charity are too uncertain and indefinite to allow the bequest to have any legal effect, and hence the

donation is void and the property results to the heirs." After discussing a number of cases decided by the chancery courts of England, and expressing the opinion that the jurisdiction under which the court acted belonged to it in the exercise of its judicial powers independent of the statute of 43 Elizabeth, the author further says: "In some of these cases the charities were not only of an uncertain and indefinite nature, but, as far as I can gather from the imperfect statement in the printed records, they were also cases where there were no trustees appointed, or the trustees were not competent to take": See, also, *Estate of Hinckley*, 58 Cal. 457; *Howe v. Wilson*, 91 Mo. 45, 60 Am. Rep. 226, 3 S. W. 390.

The views expressed by Judge Story, both as to the common-law jurisdiction of courts of chancery, and the validity of a devise for charity, although general and indefinite, appear to be better supported by authority and sounder in principle, and to have been adopted by a majority of the courts of last resort of the different states of the Union. From a consideration of the foregoing, we are disposed to the view that the doctrine of charitable trusts was a part of the common-law jurisdiction of the courts of chancery of England exercising judicial powers only, and as such has been transplanted into the courts of this state possessing common-law equity powers, and that in the administration and enforcement of charitable trusts of the character under consideration the exercise of the powers of the court must be solely judicial and none other.

804 The provision of the will under consideration is a model of clearness and conciseness of expression, and freedom from ambiguity or uncertainty in the meaning of the language used to denote the testator's will and intention. It is clearly and definitely expressed that it is the will of the testator that the property described should descend to the Bishop of Omaha, the proceeds of the same and the sale thereof to be applied to some charity, according to the judgment of the trustee, with an expression of preference that the devise be given to an orphan asylum. To avoid any contingency, it is provided that if the trustee named shall not survive the testator, then the property shall go to his successor as Bishop of Omaha, in trust, for the same purpose. It is but a natural and probable inference that in the trustee designated, as well as his successor, whoever he might be personally, the testator reposed implicit reliance and unreserved confidence in his integrity and personal character, as one who, by reason of his chosen work in life and piety, was

peculiarly fitted and well qualified to worthily bestow the endowment upon some deserving charity, to be by him selected in the execution of the charitable and benevolent intentions of the testator. It is entirely certain who the trustee is, and that the bequest was made for a charitable purpose. While a preference is expressed, the objects of the charity from which the selection is to be made are of the most general character. Is the devise to fail for that reason alone? Is it competent for a testator to devise property to a trustee with power in him to select or designate the object or objects upon which the charity is to be bestowed? In determining the question of the validity of the bequest, we should be mindful of the rule that courts view favorably donations by will for charitable purposes, and will endeavor to carry them into effect where the same can be done consistently with the rules of law: *Duggan v. Slocum*, 83 Fed. 244; *State v. Smith*, 16 Lea, 664; *Estate of Hinckley*, 58 Cal. 457.

⁸⁰⁵ It is perhaps well to note here that, in the bequest under consideration it is not attempted to establish a perpetual trust fund, the income or increase of which is to be devoted to objects of charity general in their nature, from which a selection or designation is to be made by the trustees, the same to be subject to their will and control, with power to change according to their discretion, and as they may deem desirable. Whether or not this may be done it is unnecessary here to determine. By the terms of the will in controversy it is proposed, through the power of the trustee in him vested, to apply the property and the proceeds of the same and the sale thereof to some particular and definite charity, according to the judgment of the trustee, once and for all, after which the trustee, and his duties and powers in the premises, cease and terminate, the trust having been fully discharged. In this case the trustee is willing to, and has, accepted the trust, and has sought to carry out the will of the testator by conveying the property to an orphan asylum, in conformity with the preference expressed by the testator.

In *Miller v. Teachout*, 24 Ohio St. 525, a testator had devised the residue of his estate to an executor to be invested for the use of his wife during her lifetime, and at her death, the property should be appropriated by the executor to the advancement of the Christian religion, in such manner as, in his judgment, would best promote the object named. The executor accepted the trust. "Held, that the testator had conferred ample power upon the executor to relieve the bequest of all objections arising from its indefinite character, and that so long as no obstacle

exists to the exercise of the power at the proper time, the courts of this state will not, in advance of that time, interpose, on the application of the heir, to prevent its exercise." Says Judge Day, in the opinion: "Although the power of the courts of this state to devise a scheme for the application of a vague charity may well be questioned, it does not follow that the testator cannot ⁸⁰⁶ create an agency to do it for him; and it may be regarded as settled that where a testator, creating a trust to a charitable use, defines the intention of the trust, and invests the trustee with discretionary power over the application of his bounty to the objects or for the purposes intended, the bequest will not be held invalid so long as there is no obstacle to the exercise of the power confided to the trustee, for the exercise of the power may relieve the bequest of all objections arising out of its vague and indefinite character"; and after citing a number of authorities in support of the proposition, he continues: "Nor does it make any difference, in this respect, whether the trust be of a mere administrative character in the hands of the executor, or whether it be confided to another. In either case, the will of the testator may be ascertained and made certain by those to whom he has intrusted discretion and power for that purpose, and their acts may be justly regarded as the definite expression of his own purpose." Further on, after discussing the power of the executor to make the application of the bounty of the testator to the general charitable object mentioned, he says: "So long, then, as the power thus conferred exists, ready to be exercised, and may be exercised in accordance with the will, the bequest cannot be regarded so defective as to be incapable of execution."

In *Grimes v. Harmon*, 35 Ind. 199, 9 Am. Rep. 690, cited by contestant in support of the contention that the provisions under consideration are void for indefiniteness and uncertainty, it is declared in one paragraph of the syllabus that, in a case where a charity does not fix itself upon any particular object, but is general and indefinite, and "certain and ascertainable trustees are appointed with full power to select the beneficiaries and devise a scheme or plan of application of the funds appropriated to the charitable object, the court will, through the trustees, execute the charity." Says the author of the opinion, Judge Buskirk, after reviewing the many authorities on the question: We claim that they establish ⁸⁰⁷ these principles: "If the charity does not fix itself upon any particular object, but is general and indefinite, such as the promotion of the moral

and intellectual condition of a race, or the relief of the poor, and no plan or scheme is prescribed, and no discretion is lodged by the testator in certain and ascertainable individuals, it does not admit of judicial administration. In such a case in England the administration of the charity is cast upon the king, to be executed by him, while in this country the property devised lapses to the next of kin. If, however, in such a case, certain and ascertainable trustees are appointed, with full powers to select the beneficiaries and devise a scheme or plan of application of the funds appropriated to the charitable object, the court will, through the trustees, execute the charity."

In *Fontain v. Ravenel*, 17 How. 369, the residue of an estate, left in trust for the use of the wife of the testator during her lifetime, was to be disposed of for such charitable institutions in Pennsylvania and South Carolina as the executors might deem most beneficial to mankind. The persons named as executors died during the lifetime of the wife, and before any appointment of the charity was made or attempted. It was there held that the charity could not be carried out, because the executors were vested with mere powers of appointment, and this not having been exercised, the trust must fail. The logic of the opinion, as well as its direct expression, is that an appointment by the executors at the proper time, under the powers vested, had they lived, would have rendered the trust valid and enforceable in the courts of equity.

In *Russell v. Allen*, 107 U. S. 163, 2 Sup. Ct. Rep. 327, a more recent case on the subject, Mr. Justice Gray gives expression to the following views: "They may, and indeed must, be for the benefit of an indefinite number of persons; for, if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one of the characteristics of a legal charity. If the founder ⁸⁰⁸ describes the general nature of the charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery."

In *Dye v. Beaver Creek Church*, 48 S. C. 444, 59 Am. St. Rep. 724, 26 S. E. 717, decided in 1897, the court, after referring to the many conflicting authorities on the subject, deduces, among others, the following principle: "If a trustee is appointed by the testator, and the will shows that the object of the devise, though expressed in general terms, is for a charitable use, the trust will be declared valid. In such a case the duty devolves upon the trustee of devising a scheme for carrying the trust into

effect." In the same opinion it is said: "The reason a trustee is allowed to enforce a trust, the object of which is only expressed in general terms, is that in exercising his discretion he carries out the intention of the testator."

In *Murphy's Estate*, 184 Pa. St. 310, 63 Am. St. Rep. 802, 39 Atl. 70, decided in 1898, it is held: "A bequest of the residue of an estate, 'to be divided among such benevolent, charitable, and religious institutions and associations as shall be selected by my executors' is not void for uncertainty."

Authorities holding generally to the views hereinbefore indicated may be multiplied, but it would serve no useful purpose, and we content ourselves with referring only to the following in harmony with those already quoted from: *Duggan v. Slocum*, 83 Fed. 244; *Hoeffler v. Clogan*, 171 Ill. 462, 63 Am. St. Rep. 241, 49 N. E. 527; *Staines v. Burton*, 17 Utah, 331, 70 Am. St. Rep. 788, 53 Pac. 1015; *People v. Cogswell*, 113 Cal. 129, 45 Pac. 270; *Phillips v. Harrow*, 93 Iowa, 92, 61 N. W. 434; *Fox v. Gibbs*, 86 Me. 87, 29 Atl. 940; *Powell v. Hatch*, 100 Mo. 592, 14 S. W. 49; *Minot v. Baker*, 147 Mass. 348, 9 Am. St. Rep. 713, 17 N. E. 839; *Claypool v. Norcross*, 42 N. J. Eq. 545, 9 Atl. 112; *Dodge v. Williams*, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; *Darcy v. Kelley*, 153 Mass. 433, 26 N. E. 1110; *Bedford v. Bedford*, 99 Ky. 273, 35 S. W. 926; *Guilfoil v. Arthur*, 158 Ill. 600, 41 N. E. 1009.

Holding to the doctrine contrary to the authorities ⁸⁰⁹ heretofore cited may be mentioned *Tilden v. Green*, 130 N. Y. 29, 27 Am. St. Rep. 487, 28 N. E. 880, as a leading authority. In that case it is said: "The law is settled in this state that a certain designated beneficiary is essential to the creation of a valid trust," following *Levy v. Levy*, 33 N. Y. 107, wherein it is said: "If there is a single postulate of the common law established by an unbroken line of decision, it is that a trust without a certain beneficiary who can claim its enforcement is void," no distinction being made between trusts generally and a trust for charitable purposes. Says Brown, J., the author of the opinion in the *Tilden* case: "The objection is not obviated by the existence of a power in the trustees to select a beneficiary unless the class of persons in whose favor the power may be exercised has been designated by the testator with such certainty that the court can ascertain who were the objects of the power." The opinion in this case was, in a manner, dependent upon and governed by the statutes of that state, but to what extent we have deemed it unprofitable to examine. It is reasonably clear

that the earlier decisions of the courts of that state rested upon the assumption that the doctrine of charitable uses was no part of the common law administered by the chancery courts of England, but received its support from, and grew out of, the statute of 43 Elizabeth, and that this statute was not applicable or in force in the state of New York. The opinions of the courts of Virginia, Maryland, and perhaps some other states, are in the main in harmony with those of New York.

An examination of the authorities cited by counsel for contestant holding bequests invalid for uncertainty and indefiniteness, shows that the decisions in many of them rest upon facts peculiar to the case which was under consideration; such as a failure to nominate trustees; to provide a means for the selection of beneficiaries; or to empower trustees or executors to make selection; or the devise was to charity generally, without designating the manner in which the charity may be executed; ⁸¹⁰ while some of the cases refer to trusts general in their character as distinguished from a charitable trust.

Another class of cases may be briefly referred to, which in principle may assist in arriving at a correct conclusion in the case at bar. The rule as to executory devises, depending for their complete execution upon the happening of some future event or selection, has invariably received judicial sanction, and such devises have been held valid. Thus, a bequest may be made to a corporation to be organized after the death of the testator, as was the case in the Tilden will case, *supra*; for a site for the erection of a hospital for foundlings to be built by a corporation to be established by Congress: *Ould v. Washington Hospital*, 95 U. S. 303; for the incorporation of a society for the purpose of maintaining and supporting aged, decrepit, and worn-out sailors: *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99; "for the purpose of founding an institution for the education of youth in St. Louis county, Missouri": *Russell v. Allen*, 107 U. S. 163, 2 Sup. Ct. Rep. 327. In all these cases, and many others which might be cited, the bequest was held to be valid and treated as an executory devise, depending upon the happening of some future event, which, when occurring, would vest the donation as contemplated by the testator.

In the present case it is urged that, while in many of the states charitable gifts general in their nature have been held valid, there was in all such cases a limitation as to the locality of classes from which the beneficiaries were to be chosen. To

us, conceding the proposition which we think does not hold good in many cases, this seems to be only a difference in degree, and not in principle. If a bequest to "the poor of California," or "the children of the colored race," or "the charitable institutions of Pennsylvania and South Carolina," or "to the Beaver Creek Church for poor children for their tuition," or for "benevolent and charitable purposes to be used in Cumberland county, Maine," is valid, and capable of being administered in courts of equity, we are unable to ⁸¹¹ understand why a bequest to a charity unnamed, to be selected by the trustee, is not within the principle enunciated in the many cases referred to. In *Powell v. Hatch*, 100 Mo. 592, 14 S. W. 49, a bequest "to such charitable purposes as my said trustee may deem best" was held valid. Says Barclay, J., in speaking of the case then at bar and another case decided prior thereto: "The only difference of any consequence between the facts presented in the two cases is, that in the earlier one the discretion was to be exercised among 'the charitable institutions of St. Louis,' while in the present no limitation with respect to locality appears. We do not regard this difference in the facts as affecting, in any wise, the application of the principles established in the former case." If restrictions, either as to locality or numbers included in a class of beneficiaries, are necessary to the validity of a charitable bequest, we know of no rule by which the line may be drawn. If power may be conferred upon a trustee to designate a charitable object for the testator's bounty, we doubt not that unlimited scope may be given, the only limitation being that the object must be a charitable one according to the intention of the testator.

This contract, like all others, must be construed with a view of carrying out the intention of the testator, and unless there is something in it contrary to the laws of the state, or in contravention of public policy, no reason exists for declaring it invalid. The object of the trust is clearly charitable, and is specified as such in so many words. A trustee is named, and is empowered by the testator to select for him, and as an expression of his will, a charity upon which the property in controversy is to be bestowed. The trustee has accepted the trust. He is willing to carry out its provisions, and has attempted to do so. He stands ready to make certain the very matter of uncertainty upon which contestant relies for a judgment. The will is for an object which has always been looked upon with favor by the courts. It is one of the most worthy of ⁸¹² all bequests, save, perhaps, near

kindred, having, by reason of their kinship, peculiar claims to the consideration of a testator in the distribution of his property. The bequest is sanctioned by law and contravenes no public policy. Its invalidity can be declared only by the adoption of a doctrine at variance with the great weight of authority, to wit, that the beneficiaries shall be so certain that they may come into court claiming the benefits of the trust, and demand its execution. We do not think this doctrine should be adopted in this state, and hence hold to the view that where a bequest for a charitable purpose, though entirely general and uncertain in its character, is made to a trustee who is empowered to select the object of the charity, and who is willing to or has accepted the trust, the will will not be declared invalid because of the general nature of the object or objects of the charity. The decree of the district court must be reversed, and the cause remanded for further proceedings.

CHARITABLE USES AND TRUSTS are discussed in general in the monographic note to *Hoeffler v. Clogan*, 63 Am. St. Rep. 248-269. Charities are to be favored: *Harrington v. Pier*, 105 Wis. 485, 76 Am. St. Rep. 924, 82 N. W. 345.

CHARITABLE TRUSTS.—ON THE CERTAINTY and unity required in charitable trusts, see the monographic note to *Fifield v. Van Wyck*, 64 Am. St. Rep. 756-772. Indefiniteness in the provisions of such trusts does not necessarily militate against them; *Harrington v. Pier*, 105 Wis. 485, 76 Am. St. Rep. 924, 82 N. W. 345.

CASES
IN THE
SUPREME COURT
OF
NEVADA.

KNOX v. ROSSI.

[25 Nev. 96, 57 Pac. 179.]

INTERNAL REVENUE STAMPS — UNSTAMPED DOCUMENT AS EVIDENCE—STATE COURTS.—The provision of the war revenue act of Congress approved June 13, 1898, that no document required by law to be stamped shall be admitted in evidence until a legal stamp has been affixed thereto, applies to those courts only which have been established under the constitution of the United States and by acts of Congress, over which Congress can legitimately exercise control, and does not apply to state courts.

Frank H. Norcross, for the appellant.

Goodwin & Dodge, for the respondent.

99 BELKNAP, J. At the trial the plaintiff offered in evidence two depositions taken under a commission issued to a notary public of the city of San Francisco, state of California, with his certificate thereunto attached. One of these was objected to upon the ground that the stamps required by the act of Congress, approved June 13, 1898, entitled, "An act to provide ways and means to meet war expenditures and for other purposes," were not canceled upon the day the certificate bears date. The other was objected to upon the ground that the certificate was not stamped as required by the provisions of the beforementioned law. Each objection was sustained, and the evidence excluded.

We have not been referred to any adjudication of the provisions concerning stamped instruments offered in evidence under the act of Congress cited, but substantially the same provisions,

contained in the internal revenue law of 1862, have frequently been the subject of judicial construction.

One of the early cases under this law was *Carpenter v. Snelling*, 97 Mass. 452. After stating that the law did not, in terms, extend to state courts—and the law of 1898 in this respect is the same—the decision proceeds: “The language of the enactment is only that no instruments or documents not duly stamped shall ‘be admitted or used as evidence in any court’ until the requisite stamps shall be affixed. This provision can have full operation and effect if construed as intended to apply to those courts only which have been established under the constitution of the United States and by acts of Congress, over which the federal legislature can legitimately exercise control, and to which they can properly prescribe rules regulating the course of justice and the mode of administering justice. We are not disposed to give a broader interpretation to the statute. We entertain grave doubts whether it is within the constitutional authority of Congress to enact rules regulating the competency of evidence on the trial of cases in the courts of the several states which shall be obligatory upon them. We are not aware that the existence of such a power has ever been judicially sanctioned. There are numerous and weighty arguments against its existence. We cannot hold that there was an intention to exercise it, where, as in the provision now under consideration, the language is fairly susceptible of a meaning which will give it full operation and effect within the recognized scope of the constitutional authority of Congress.”

In *Green v. Holway*, 101 Mass. 243, 3 Am. Rep. 339, the same court said: “The decision in *Carpenter v. Snelling*, 97 Mass. 452, that this enactment must be limited to the courts of the United States, and not be construed to extend to, if, indeed, it could constitutionally bind, the state courts, was made after full consideration, is in accordance with the judgments rendered without a doubt being raised upon this point, by the supreme courts of Vermont, Maine, and Pennsylvania in the cases above cited, and with the later adjudications of the very question in *Griffin v. Ranney*, 35 Conn. 239, *Craig v. Dimock*, 47 Ill. 308, *Bunker v. Green*, 48 Ill. 243, and *United States Exp. Co. v. Haines*, 48 Ill. 248, and is in harmony with, if it does not fall within, the principle of construction upon which the amendments of the constitution of the United States securing fundamental rights in the modes of judicial proceedings have¹⁰¹ been held to apply to such proceedings in the courts of the

United States only, and not to those in the courts of the several states: *Twitchell v. Commonwealth*, 7 Wall. 321, and cases cited; *Livingston v. Moore*, 7 Pet. 482, 551; *Commonwealth v. Hitchings*, 5 Gray, 482."

Decisions contrary to the views here stated were made in the cases of *Maynard v. Johnson*, 2 Nev. 25, and *Wayman v. Torreyson*, 4 Nev. 124, but when these cases were decided the effect of congressional legislation upon the jurisdiction and practice of the state courts had not received the careful judicial consideration afterward given it, and no suggestion was then made that the act of Congress prescribed a rule of evidence for federal courts only.

Judgment reversed and cause remanded for a new trial.

EVIDENCE. — AN UNSTAMPED INSTRUMENT is admissible in evidence in state courts: *Insurance Cos. v. Estes*, 106 Tenn. 472, 82 Am. St. Rep. 892, 62 S. W. 149; *Kennedy v. Roundtree*, 59 S. C. 324, 82 Am. St. Rep. 841, 37 S. E. 942. See, also, monographic note to *Garland v. Gaines*, 73 Conn. 662, 84 Am. St. Rep.

EX PARTE GAFFORD.

[25 Nev. 101, 57 Pac. 484.]

CRIMINAL LAW.—A SENTENCE for imprisonment which states the period of its duration and the place of confinement is not void for uncertainty because it fails to fix the time for the imprisonment to commence.

CRIMINAL LAW — SENTENCE — SECOND OFFENSE — TERM OF IMPRISONMENT.—Where a defendant is already in execution on one sentence, and a second sentence does not state that the term is to begin at the expiration of the former, the second sentence runs concurrently with the first.

CRIMINAL LAW—JOINT SENTENCE—HABEAS CORPUS. Where a court has jurisdiction to try two or more defendants upon a joint indictment for the same public offense, a joint sentence of such defendants is not void, however erroneous it may be; and whether erroneous or not cannot be determined on habeas corpus.

HABEAS CORPUS PROCEEDINGS cannot be used to authorize the exercise of appellate jurisdiction.

Samuel Platt, for the petitioner.

W. D. Jones, attorney general, contra.

103 BONNIFIELD, C. J. Petitioner alleges that he is illegally restrained of his liberty by the warden of the state prison. It is shown that on the twenty-sixth day of January, 1895, the

petitioner was duly sentenced by the district court of Washoe county to serve a term of four years in said prison for the crime of an attempt to break jail; second, that on the fifth day of May, 1895, the petitioner and one Seward Leeper, upon a joint indictment, trial and conviction for the crime of an assault with intent to kill, were jointly sentenced by said court to serve a term of seven years in said prison, that it was not specified when said second term should begin, and that the petitioner has fully served said first term.

Counsel contends that the second sentence is void for uncertainty, in that it neither provides that the second term shall begin at the expiration of the first, nor at any other specified time. But a sentence which does not specify any time for the imprisonment to commence is not void. The better practice is not to fix the commencement of the term, but merely to state its duration and the place of confinement, where the statute does not otherwise provide: *State v. Smith*, 10 Nev. 106; *Bishop's New Criminal Procedure*, 804, and cases cited.

Where the defendant is already in execution on a former sentence, and the second sentence does not state that the term is to begin at the expiration of the former, the second will run concurrently with the first, in the absence of a statute providing a different rule: 21 Am. & Eng. Ency. of Law, 1075, note 4.

The second contention is that where two or more defendants are convicted under a joint indictment, they must be separately sentenced; that the said second sentence being against said two defendants jointly, and not against each separately, it is void, in that it was not within the jurisdiction of the court. Under the statute, two or more defendants may be jointly indicted and tried for the same public offense; ¹⁰⁴ and, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly, and the case as to the rest may be tried by another jury: Gen. Stats. 4240, 4293.

The court had jurisdiction of the subject matter embraced in the indictment, and of the defendants, and jurisdiction to enter judgment against the defendants on the joint verdict of the jury of guilty. The court having such jurisdiction, its judgment or sentence is not void, however erroneous it may be. But whether erroneous or not this court cannot determine on habeas corpus. Habeas corpus proceedings cannot be used to authorize the exercise of appellate jurisdiction.

"We can only look at the record to see whether a judgment exists, and have no power to say whether it is right or wrong. It is conclusively presumed to be right until reversed, and, when the imprisonment is under process valid on its face, it will be deemed *prima facie* legal; and, if the petitioner fails to show a want of jurisdiction in the magistrate or court whence it emanated, his body must be remanded to custody": *Ex parte Winston*, 9 Nev. 71, and authorities there cited.

General Statutes, 3689, provides that it shall be the duty of the judge, on the hearing, in case of habeas corpus, if the time during which the party may be legally detained in custody has not expired, to remand such party if it shall appear that he is detained in custody by virtue of the final judgment of any competent court of criminal jurisdiction, or of any process issued upon such judgment.

The writ issued herein is dismissed, and the petitioner remanded to the custody of the warden of the state prison.

CONCURRENT SENTENCES.—If it is not stated in either of two sentences imposed at the same time that one shall take effect at the expiration of the other, the periods of time named in them run concurrently, and the two punishments are executed simultaneously: *Breton, Petitioner*, 93 Me. 39, 74 Am. St. Rep. 335, 44 Atl. 125.

DAVIS v. SIMPSON.

[25 Nev. 123, 58 Pac. 146.]

COUNTY BONDS—MANDAMUS TO LEVY TAX—LIMITATIONS.—Where a board of county commissioners is empowered by statute to levy a special tax for the payment of interest on county bonds, and to provide a sinking fund for the payment of the principal of such bonds, such board, having failed and refused to provide the fund from which the interest and principal can be paid, and to which the holder alone could look for payment, may be required by mandamus to levy and collect such tax, and cannot interpose the statute of limitations as a defense.

STATUTE OF LIMITATIONS—WHEN DOES NOT RUN.—When payment is provided for out of a particular fund, or in a particular way, the debtor cannot plead the statute of limitations without showing that the particular fund has been provided, or the method pursued.

Application by the plaintiff against the board of county commissioners of Lincoln county for a writ of mandamus.

A. C. Freeman and G. E. Bates, for the petitioner.

F. R. McNamee, district attorney, for the respondent.

¹²⁸ MASSEY, J. It is shown by the petition that, pursuant to an act of the legislature approved February 17, 1873, Lincoln county issued and delivered certain bonds to one Harry I. Thornton; that the petitioner was and is the owner and holder of said bonds; that said bonds, nor any part of them, have not been paid, and that the interest thereon from the date of maturity to the first day of January, 1899, amounting in the aggregate to nine thousand six hundred and twenty dollars, is also due and unpaid.

It is also shown that the respondents, as the board of county commissioners of said county, have refused and neglected to levy the special tax provided for in said act for the purpose of creating a fund for the payment of said bonds and the interest due thereon.

To the petition the respondents have answered, in effect admitting the material averments therein, but alleging as a defense thereto that since the year 1885, and up to the year 1896, the respondents have not levied or collected any interest tax for the payment due on said bonds under the provisions of the act of 1873; that of the proceeds of the tax levied for interest on the outstanding bonds of said county in 1885 there remained in the interest fund of said county, up to ¹²⁹ 1894, the sum of six hundred dollars applicable to the payment of said bonds and interest; that in March, 1894, the sum of five hundred and ninety dollars of said sum was paid out upon interest coupons then presented, leaving a balance in said fund of ten dollars; that the cause of action set forth in the petition did not accrue to the holder of said bonds within six years immediately preceding filing the petition, and therefore the statute of limitations applies against the bonds and any interest alleged to be due thereon since the date of maturity.

The facts stipulated are that from 1885 to 1896 the board of county commissioners did not levy or collect a tax provided for in section 8 of the act approved February 17, 1873 (Stats. 1873, p. 54), nor did they levy any tax during said years for said bonded indebtedness, or any part thereof; that of the levy of 1885 the sum of six hundred dollars remained in the interest fund until March, 1894, when five hundred and ninety dollars thereof was paid out upon the coupons of said bonds; that the sum collected from the tax levy of 1896, 1897, and 1898

amounted annually to about the sum of two thousand four hundred dollars, and was consumed in paying coupons of said bonds which matured on January 1, 1883, and prior thereto; that no interest maturing on petitioner's bonds subsequent to January 1, 1883, has been paid, and no means exist for their payment, unless the respondents can be required to levy and collect a tax provided for in the act of 1873.

Practically the same question was presented to and decided by this court in the action of *State v. Board of Commrs.*, etc., 23 Nev. 262, 45 Pac. 982. Counsel for respondent seeks, in his brief, to distinguish that case from the case at the bar, claiming that the presentation of the coupons under the act of 1877 created a new contract as to the coupons alone.

We fail to note the distinction made. By section 8 of the act of 1873, it is provided that, in addition to the ordinary taxes for county purposes, there shall be for the year 1873, and annually thereafter until the principal and interest of said bonds shall be fully provided for, levied and collected a special tax, to be called the "interest tax," of forty-five cents on each one hundred dollars of taxable property of the county. The fund derived from this tax shall be applied only to the payment of the interest accruing upon said bonds, provided that, ¹³⁰ should said funds furnish a surplus over and above what may be required for the payment of said interest, such surplus shall be turned over and paid into the sinking fund provided for by section 10 of the same act.

Section 10 created a sinking fund, into which should be paid any and all surplus of the interest fund aforesaid, and required that each of the payments should be continued until the sinking fund should be sufficient for the payment of the principal and interest of the bonds. It will therefore be observed that the act authorizing the issuance of the bonds provides a special fund to which the holder could look only for the payment of the interest and principal; that there is no other fund provided for by law out of which payment of these bonds, or any interest thereon, can be made.

In the language of the court in *State v. Board of Commrs. of Lincoln Co.*, 23 Nev. 262, 45 Pac. 982: "As long as the tax was being levied and collected, there was no occasion for him to bring an action, and, if he had, it seems very probable it could not have been maintained, had the proper defense been made. But when the money was collected he would be entitled to it. Then his cause of action would be fully ripe, and if not prose-

cuted within the statutory period would doubtless be barred. If not levied or collected, his remedy would be the one he is now pursuing to compel the officers to do their duty in the premises."

The board of county commissioners having failed and refused to provide the fund from which the interest and principal of these bonds could be paid, and to which the holder could look alone for payment, the statute of limitations cannot be successfully interposed.

"It is a general rule that, when payment is provided for out of a particular fund, or in a particular way, the debtor cannot plead the statute of limitations without showing that the particular fund has been provided, or the method pursued": *Sawyer v. Colgan*, 102 Cal. 283, 36 Pac. 580; *State v. Board of Commrs. of Lincoln Co.*, 23 Nev. 262, 45 Pac. 982.

The writ will therefore issue.

TAXATION.—ON MANDAMUS against a municipality to compel the levy of taxes, see *Hammond v. Place*, 116 Mich. 628, 72 Am. St. Rep. 543, 74 N. W. 1002; *Bear v. Commissioners*, 124 N. O. 204, 70 Am. St. Rep. 586, 32 S. E. 558.

STATE v. SADLER.

[25 Nev. 131, 58 Pac. 284.]

QUO WARRANTO—CONTESTED ELECTION—JURISDICTION.—WHERE THE ATTORNEY GENERAL refuses to bring an action to oust one who, he has reason to believe, unlawfully holds a state office, the person claiming to be elected to such office may, upon leave of court, bring an action in quo warranto in the name of the state on his own relation, where he has no other remedy.

ELECTIONS—IMPROPER APPOINTMENT OF INSPECTORS.—A statute providing that inspectors and clerks of election shall not be appointed from the same political party is directory, and a mere noncompliance therewith, not resulting in fraud, is not sufficient ground for rejecting the vote of the county or precinct.

ELECTIONS.—MISCONDUCT ON THE PART OF INSPECTORS, ELECTORS, AND BYSTANDERS is not sufficient ground for rejecting the vote of a precinct, where the person elected neither knew of, nor participated in, the misconduct, and it is not shown that any elector who voted for the person elected either participated in, or was influenced by, such misconduct, and that no elector was prevented from properly voting.

ELECTIONS—VALIDITY OF.—ANY IRREGULARITY in conducting an election which does not deprive an elector of the

right to vote, nor admit a disqualified person to vote, nor cast uncertainty on the result, and which has not been occasioned by the agency of the party whose right to office is in contest, does not vitiate the election.

ELECTIONS—SOLDIERS' VOTE—ABSENCE FROM THE STATE.—An election ordinance in pursuance of an act of Congress providing that a constitution shall be submitted to the people of the territory of Nevada including those in the army of the United States both within and beyond the boundaries of the territory, does not apply to future elections held under the state government.

ELECTIONS—SOLDIERS' VOTE.—In the absence of a statute regulating the manner of voting or holding elections by persons who may be in the military or naval service of the United States, beyond the boundaries of the state, no such election can be legally held.

ELECTIONS — MUNICIPAL CHARTER—COUNCILMEN.—Under a city charter, one section of which provides that councilmen shall be chosen by the qualified electors, no two councilmen to be residents of the same ward, and a later section provides that one councilman shall be elected in each ward, who shall be a resident of such ward, each councilman is chosen solely by the electors of his ward.

ELECTIONS — BALLOTS — UNAUTHORIZED NAMES — FRAUD.—Ballots, which contain the names of persons nominated for office which do not belong on it, are not invalid as to candidates whose names are properly thereon, in the absence of any showing of fraud or corruption.

ELECTIONS—VACANCY IN OFFICE—STATE OFFICER ACCEPTING FEDERAL POSITION.—The acceptance by a state officer of a United States office is a resignation of the state office, and creates a vacancy in such office.

ELECTIONS—VACANCY—PROCLAMATION BY GOVERNOR.—UNDER A STATUTE providing that when a vacancy occurs in the office of a member of the legislature, and the legislature is to convene before the next general election, the governor shall issue a writ of election to fill such vacancy, no writ of election is required to enable the people to fill a vacancy, where the legislature is not to convene before the next general election.

ELECTIONS—REGISTRATION—ILLNESS OF REGISTRY AGENT.—The registration of voters by one not the regular registry agent, at the request, and by reason of the illness, of such agent, is without authority of law, where the statute makes no provision for the registration of voters in case of the illness of the registry agent.

ELECTIONS—IRREGULAR REGISTRATION—VALIDITY OF BALLOT.—The ballot of a duly qualified elector whose name is on the official register should not be rejected on account of irregular or illegal registration.

ELECTIONS—RIGHT TO VOTE.—INSPECTORS OF ELECTIONS are mere ministerial officers, and have no right to refuse to receive the vote of one whose name is on the official register, except upon his failure to prove his identity as the person who was registered in that name.

ELECTIONS — REGISTRATION — PRECINCTS — TRANSFER.—In a county where there are no legally established election precincts, a properly registered elector may take his registration certificate and have his name registered at any other polling place

in the same county at any time before the delivery of the register to the election inspectors.

ELECTIONS—BALLOTS—IDENTIFYING MARKS.—A ballot is not void and will be counted when it appears therefrom that the elector has attempted to make a cross after or following the names to be voted for, though the lines are rough or irregular, or resemble the letters "Y," "T," or "V"; neither will a ballot be rejected because it contains marks occasioned by accident, or made by election officers after the ballot had been cast by the voter.

ELECTIONS — BALLOTS — ILLEGAL IDENTIFYING MARKS.—A ballot will be rejected when it appears therefrom that the elector has made no attempt to mark the ballot with the required cross at the proper places, but has made marks of a wholly different character, such as the letters "S," "W," "N," or "O," or horizontal or perpendicular lines, or where the ballot contains on its face other marks, scratches, or words deliberately made by the voter, or where the required cross is made at an improper place on the ballot.

ELECTIONS — BALLOTS — VOTING FOR TWO CANDIDATES FOR SAME OFFICE.—Ballots are not void because the voter has voted for more candidates for the same office than were to be elected, but they will not be counted for such office.

ELECTIONS.—BALLOTS WITH THE CROSSES directly on the line between the names of the candidates for the same office, in such a position as to prevent the court from determining for what candidate they were intended to be cast, while not void, will not be counted for such office.

ELECTIONS — BALLOTS — COLORED PENCIL.—Ballots marked with ink, or with a blue or purple pencil, are void.

ELECTIONS — BALLOTS — UNIFORMITY — RESIGNATION OF CANDIDATE.—Under an election law requiring uniformity in the kind of paper used for ballots, uniformity in the printing, and in the character of markings to be used by the electors, no change can be made in the face of a ballot as printed whereby more than one kind of official ballot is printed and distributed. Hence, where, upon the resignation of a candidate, new ballots are printed omitting his name, and are distributed with the old ballots upon which such candidate's name has been canceled by a red line, the red line ballots, cast in a precinct where there were sufficient new ballots for all who desired to vote, are void.

Trenmor Coffin, A. E. Cheney, M. A. Murphy, Samuel Platt, E. D. Vanderlieth, and O. J. Smith, for the relator.

Thomas Wren, William Woodburn, J. R. Judge, R. M. Clarke, E. L. Sadler, and A. J. McGowan, for the respondent.

163 PER CURIAM. At the general election of 1898, the relator, the respondent, George Russell, and J. B. McCullough were candidates for the office of governor of the state of Nevada. By the official canvass it appeared that the respondent received three thousand five hundred and seventy votes, and the relator three thousand five hundred and forty-eight votes, and each of the other candidates a lesser number than the relator. The

respondent was declared duly elected to the said office for the term of four years from the first Monday in January, 1899. A commission was duly issued him accordingly, and upon said last-named date he ¹⁶⁴ duly qualified and entered upon the discharge of the duties of said office.

This proceeding is brought to oust the respondent from said office, and to instate the relator therein. The relator, by his complaint, alleges that on the second day of January, 1899, the respondent usurped, intruded into, and ever since and now unlawfully holds, the office of governor of the state of Nevada, and ever since has, and now withholds the said office from relator. He alleges that the relator received the highest number of the legal ballots cast for said office, and was duly elected thereto, and that a great number of ballots were cast and counted for the respondent which were illegal and void, on certain grounds named, which should have been, and should now be rejected from the count of votes cast for governor, and that, if they be excluded therefrom, the true result of the election will be found to be in favor of the relator.

It is due the able array of counsel of the respective parties to state that they have exhibited remarkable industry in presenting the facts, and in compiling the authorities in support of their several contentions on the legal points involved, and have maintained their positions on both questions of law and fact with great clearness and ability. To give in full the questions raised, and note the argument of counsel and the authorities cited, would doubtless fill a volume of the Nevada Reports.

In the preparation of the final opinion the members of the court have endeavored to state as plainly and concisely as they could the more important legal questions presented, and the rulings thereon made during the progress of the trial, as well as those reserved for determination till the close, with brief citations of authorities, and mainly without elaboration. For full citation of authorities on the several questions raised and discussed, reference is made to the briefs of the counsel. The desire of the court has been, throughout the trial, to reach as speedily as possible the final and paramount question in this case, For which of the candidates, the relator or the respondent, were the greater number of legal ballots cast for the office of governor? and from the evidence ¹⁶⁵ obtained by an inspection of the ballots themselves to arrive at a correct conclusion.

Preliminary Question: The respondent presented a preliminary question — an objection to the jurisdiction of the

court on the ground that the proceeding was not brought by the attorney general, or in his name. The statute authorizes that officer to bring such action upon his own information, or on the complaint of a private party in the name of the state, against any person he has reason to believe usurps, intrudes into, or unlawfully holds or exercises, any public office or franchise: Gen. Stats. 3342. He may, in addition to the statement of the cause of action, set forth in the complaint the name of the person rightly entitled to the office, with a statement of his rights there-to: Gen. Stats. 3343. The attorney general, not believing that the respondent had usurped, intruded into, or was unlawfully holding the office of governor, refused to bring the action. He interposed no objection to the relator bringing the action in the name of the state on his own relation, and the court granted him leave to do so. The constitution vests in this court original jurisdiction in quo warranto proceedings. The respondent's objection was overruled, not without the court entertaining doubts as to the correctness of the ruling. To have dismissed the proceeding would have left the relator without an adequate remedy, although by his complaint he showed that he had a right to said office.

"An act relating to elections" (Laws 1873, p. 197) provides for contesting the election of any person declared duly elected to a district, county, or township office, but it contains no valid provision for contesting the election of a person declared elected to a state office. The only remedy a person has who may be duly elected to a state office to oust one unlawfully holding the same, and have himself instated, is by proceeding in quo warranto; and when the prosecuting officer refuses to institute such proceedings there is no remedy, unless the contestant be permitted to bring the action on his own relation. Evidently the legislature did not intend to deny to any person the right to have his claim to an office adjudicated by the courts in the event of the refusal of the ¹⁶⁶ prosecuting officer to act, when such person's claim is based on such alleged facts as show him to be entitled to the office. By an oversight the legislature has failed to provide for such contingency. Its attention now being called to it, doubtless appropriate legislation will be had, and contestants and courts be relieved from such embarrassment.

Inspectors and Clerks: The statute (Laws 1873, sec. 2, p. 197) provides that the inspectors and clerks of election "shall not be appointed from the same political party." The question of the validity of the appointment of inspectors and clerks in

Humboldt and Lander counties from the same political parties was raised by respondent's demurrer to the complaint. Held, that said provision of the statute is directory, and noncompliance therewith, simply, is not sufficient ground for rejecting the vote of the county or precinct; that it is only those provisions of the election law relating to the time and place of holding elections, the qualifications of voters, and such others as are made essential prerequisites to the validity of an election, that are mandatory; that an honest or mistaken disregard of them, not resulting in fraud, will not justify the rejection of an entire vote of a precinct: *Russell v. McDowell*, 83 Cal. 70, 23 Pac. 183; *Paine on Elections*, 379; 6 Am. & Eng. Ency. of Law, 302; *McCrary on Elections*.

Misconduct on the part of the inspectors, electors, and bystanders at Paradise and Kennedy precincts in Humboldt county, and at three precincts named in Lander county, at said election, was alleged by the complaint, setting forth specific acts done, such as are prohibited by an act to promote the purity of elections, and by that act made criminal offenses. It was not alleged that the respondent in any manner participated in said acts, or that they were done with his knowledge or consent, or that any elector who desired to vote for the relator was prevented from properly marking his ballot in secret and casting it for him, or that any elector was influenced to vote for respondent on account of any of the alleged acts, or that any elector who voted at either of said precincts participated in any of the said acts. On demurrer to the complaint, held, that said alleged acts are not sufficient grounds for rejecting the vote of any of the said precincts from the canvass of the votes cast for governor.

¹⁶⁷ By the terms of said act to promote the purity of elections, it is provided that the election of a person to office shall not be void, nor shall he be removed from or deprived of his office, by reason of the commission of any of the offenses prohibited by said act, if not committed by him, or with his knowledge or consent: 6 Am. & Eng. Ency of Law, 359, 360; *McCrary on Elections*, 530; *State v. Mason*, 14 Ia. Ann. 505. And that it is well settled by authority that any irregularity in conducting an election which does not deprive a legal elector of casting his vote according to law, or admit, a disqualified person to vote, or cast uncertainty on the result, and has not been occasioned by the agency of a party whose right to office is in contest, shall not vitiate the election: *Gass v. State*, 34 Ind. 425; *Cooley's Constitutional Limitations*, 6th ed., 777, and cases cited.

The Soldiers' Votes: It was alleged by the complaint that Troop A, First Nevada Cavalry, in actual service, in the United States army without the boundaries of the state, on the eighth day of November, 1898, on board ship on the high seas, between the coast of California and the Hawaiian Islands, who were citizens and electors of this state, held an election and cast their ballots in due form of law, and made due return thereof to the secretary of state; that the board of canvassers, consisting of the governor, chief justice of the state, and the United States district attorney, as provided in the election ordinances of the constitution of this state, and the present state board of canvassers, consisting of the chief justice and one or more of the associate justices, have each failed to open and canvass said soldiers' votes; that said votes, if opened and canvassed, will show eleven votes cast for the respondent and twenty-four votes cast for relator; and that said votes should be canvassed and counted by the court. Held, that said election ordinance applied only to the election held in pursuance of the mandate of Congress, found in the enabling act, requiring the constitutional convention to submit for ratification or rejection the constitution to the people of the territory of Nevada, including those in the army of the United States, both within and beyond the boundaries of the territory; that the provisions of said ordinance do not, and were not intended to, apply to future elections held under the ¹⁶⁸ constitution and state government, but only to the election therein specifically provided for, and to any future election that Congress might for any reason order for resubmitting the constitution to the people of the territory, as Congress did with reference to a constitution framed by a convention for Kansas a few years before; that there is no statutory provision regulating the manner of voting or holding elections by persons who may be in the military or naval service of the United States, beyond the boundaries of the state, or for making returns of such election; and that without such provisions no such election could be legally held: Cooley's Constitutional Limitations, 98.

The Answer: The respondent's answer consists of denials and allegations. The question of the validity of four hundred and forty-seven ballots cast for relator in Reno was raised. It was most earnestly and elaborately argued by respective counsel, as the decision of the court, if against relator's contention, it was doubtless considered, would terminate the proceeding, under a rule adopted in *Sweeney v. Hjul*, 23 Nev. 409, 48 Pac. 1036,

49 Pac. 169. The opinion and rulings of the court on that question were given as follows:

"The respondent has set up in his answer, as an affirmative defense, that at said election there were five election districts duly established in the city of Reno, each district embracing one of the five wards of the city; that the act incorporating the city provided that the electors of each ward should elect one councilman, the five councilmen thus elected to constitute the board of councilmen of said city; that in each ward a certain number of ballots, all of which had printed thereon the names of all the candidates for city councilmen, were cast and counted for the relator, amounting in the aggregate in all the wards to four hundred and forty-seven ballots, on which there were crosses and other illegal and distinguishing and identifying marks made opposite the names of the persons named and nominated for councilmen in each of the other wards of the city.

"The relator interposed a general demurrer to that portion of the answer, and asked the court to decide the question of the validity of the ballots cast in the respective wards by voters who voted for councilmen who resided in, and were ¹⁶⁹ candidates for the office of councilman for, a ward other than that in which the voter resided or was entitled to vote, irrespective of the allegations that said ballots contained other distinguishing and identifying marks. It is claimed by the relator that, under the act incorporating the city of Reno (Stats. 1897, p. 50), each elector of the city had a right to vote for all five of the city councilmen. Upon this question the court is of one mind. By section 3 of said act it is provided that the corporate powers of the city shall be vested in a city council, to consist of five members, who shall be actual residents and owners of real estate in the city, who shall be chosen by the qualified electors thereof, provided that no two or more of said five councilmen shall be residents of the same ward. If this section stood alone, without further enactment limiting or restricting in any manner its provisions, then would the claim of the relator be tenable; but it is further provided by section 5 of said act that at the general election in November, 1898, and at each general election thereafter, there shall be elected one councilman in each ward, who shall be a resident of such ward, and an owner of real estate in the city, who shall hold office for the term of two years, and until their several successors are elected and qualified.

"The further provision of said section relates to the manner of filling any vacancy that may occur in the board, and the

time the councilmen so elected shall enter upon the discharge of their duties. It cannot be said or urged with any reason that the legislature did or intended to do an unnecessary thing by the enactment of section 5 of said act, yet, if relator's contention is true, then it was unnecessary to provide that there should be elected 'one councilman in each ward who shall be a resident of such ward,' as section 3 practically made provision for the same. If the legislature did not intend what is said in express terms, then it did an unnecessary thing, and the requirements of section 5 would have been complete by the simple provision for the election of five councilmen at the general election of 1898, and at each general election thereafter, to hold office for a term of two years, and until their successors are elected and qualified. This is the construction we are asked to put upon this section, and, in order so to do, must eliminate language deliberately ¹⁷⁰ incorporated in the statute by the legislature, that would give it a meaning different from the one claimed.

"It is not our duty to legislate, or to destroy legislative intention, except for constitutional reasons, under well-established rules. It is our duty to construe laws and give effect to legislative intention. Under well-settled rules of construction (so well settled as not to require citation of authorities), to the effect that the courts will look into the statutes themselves (the language used by the law-makers in the statutes), and, in order to give effect to all the provisions of the statutes, will consider the various sections thereof together, the question becomes plain and simple. Under these rules the councilmen of the city of Reno were to be chosen by the electors of the city—each councilman by the electors of his ward. In other words, section 3 provides for the election of the city councilmen of the city, and section 5 provides for the manner of their election, etc. The language used in our constitution presents almost an exactly parallel case, from which the same claim could as reasonably be made, and yet no one would pretend to make such a claim. Section 1 of article 2, providing how and by whom the elective franchise may be enjoyed, declares that every male citizen of the United States, not laboring under disabilities named in the constitution, of the age of twenty-one years and upward, who shall have actually, and not constructively, resided in the state six months, and in the district or county thirty days, next preceding any election, 'shall be entitled to vote for all officers that now are or hereafter may be elected by the people, and upon all questions submitted to the electors at such election.'

"The right to vote for all officers, from governor to and including all assemblymen and state senators, could not be given in stronger or broader language, and, standing alone, such right might reasonably be claimed by the elector; yet no one claims to exercise the right, because, by subsequent sections, in a different article, provision is made for the election of senators and assemblymen in their respective districts. The assertion of any such right by the individual elector could be maintained only by ignoring and utterly disregarding the subsequent sections regulating and governing the ¹⁷¹ election of senators and assemblymen in their respective districts. The same may be said of section 3, incorporating the city of Reno. If each elector of the city has the right to vote for all the five councilmen to be elected therein, then must we disregard the express provision of section 5 of the same act. It has also been claimed that a councilman, under the law, has no exclusive power or authority in his own ward. Here, again, the analogy between the statute and constitution is apparent. Neither has the assemblyman or senator, by constitution or law, any exclusive power or authority in his county or district.

"We come now to the more serious and important question, involving the application of the rule laid down in *Sweeney v. Hjul*, 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169, to the facts alleged in respondent's answer. We fully realize the importance and effect of that rule, and the strength of the reason upon which it is based, under the Australian ballot law, as applying to the individual elector and the individual ballot; yet a case has arisen under the construction of that act which could never have been contemplated by the legislature in its passage, and the strict construction of which would operate to disfranchise a large per cent of the voters of the state living in the same county, and by the same strictness of construction would, upon a more careful examination of the act, exclude the ballots of any precinct or county which might, through the fault of the officers, have printed thereon names of officers for whom the elector had no right to vote in such precinct or county.

"The right of the single elector may be and is just as sacred as the rights of the many, under our constitution; yet where a construction of the law is likely to disfranchise a large number of the electors in a case, arising through the mixed fault of the officers and voters in preparing and casting ballots in a precinct or county, in which reason almost conclusively suggests that there was neither fraud nor corruption on the part of either,

there being no showing, by averment or otherwise, outside the ballots, of such fraud or corruption, and which never could have been contemplated by the legislature in the passage of the act, the language of which must be construed by the court in order to give it a just and reasonable effect and harmonize it with constitutional ¹⁷² rights, and that much desired purity of election intended by its passage, and where it is apparent that any modification of the construction of such act heretofore given cannot be made in the interest of many, under the above showing, without injury to the individual and his rights, then justice demands that the rule and construction be abrogated, in the interest of all, and the settlement of the matter be left to the legislative department to provide in express and certain terms, having regard for the constitution, plain and simple rules that shall govern in all such cases.

“For these reasons a majority of the court deem it proper to overrule that part of the decision in *Sweeney v. Hjul*, 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169, applicable to the facts shown by that part of the answer under consideration, and sustain the relator’s demurrer thereto. This conclusion has been reached after deliberate and careful consideration and discussion, and not without some doubt, and is based in part upon the rule that public interest in matters of this kind will be best subserved by giving a law of doubtful meaning the construction that will result in the least wrong and injustice.”

The Election in Storey County: For further answer the respondent alleged, in substance, that on the third day of November, 1896, F. C. Lord was duly elected state senator for Storey county for the term of four years from and after the fourth day of said November, and subsequently duly entered upon the discharge of the duties of his office; that thereafter, on the eighth day of July, 1898, he was duly appointed paymaster in the army of the United States (a lucrative office), with the rank of major; that on the —— day of October, 1898, J. A. Conboie was nominated as a candidate for state senator by petition filed with the county clerk of said county, to fill the unexpired term for which Lord had been elected; that at said last-named date there was no vacancy in the office, and the governor of Nevada had not by proclamation called an election to fill any such vacancy; that the name of J. A. Conboie was printed on the ballots distributed and used in all the precincts in said county at said election; that there were five hundred and ninety-five ballots cast and counted for relator for said office of governor with the name of said J.

A. Conboie printed thereon as a candidate for state senator, and with a cross opposite his ¹⁷³ name on each ballot. It was alleged that said ballots, by reason of the above alleged facts, were illegal and void, and should not have been, and should not now be, counted for the relator.

The constitution provides: "No person holding any lucrative office under the government of the United States, or any other power, shall be eligible to any civil office of profit under this state": Const., art. 4, sec. 9. It was admitted in argument on demurrer to the above portion of the answer that F. C. Lord accepted said appointment and entered upon the duties of the office. Held, that, by reason of the acceptance of said appointment, he became incapable of legally holding the office of state senator; that the acceptance of the federal office was a resignation of the state office, and created a vacancy in the latter office: *State v. Clarke*, 3 Nev. 570; *State v. Clarke*, 21 Nev. 333, 37 Am. St. Rep. 517, 31 Pac. 545; *McCrary on Elections*, 3d ed., sec. 301; *People v. Carrique*, 2 Hill, 93; *People v. Leonard*, 73 Cal. 230, 14 Pac. 853. It was contended by counsel, upon the authority of the California cases, that a special election must be held to supply a vacancy occurring before the expiration of a full term in office, and that the proclamation of the governor is necessary to the validity of a special election. No such proclamation was issued with respect to any vacancy in the said office of state senator.

Section 1668 of the General Statutes provides: "When any vacancy shall occur in the office of a member of the senate or assembly by death, resignation, or otherwise, and a session of the legislature is to take place before the next general election, the governor shall issue a writ of election . . . to fill such vacancy." Held, that no proclamation or writ of election was necessary to enable the people of said county to legally fill said vacancy at said election, as there was no session of the legislature to take place between the date of the occurrence of said vacancy and the next general election. It was argued that voters are not presumed to know that an officer has resigned or died, and that one of the functions of the governor's proclamation is to give notice of the fact of a vacancy. But F. C. Lord was a prominent citizen of Storey county, and well known to the people, and for several years prior and up to said appointment was the duly commissioned ¹⁷⁴ and acting colonel of the Nevada National Guard. His appointment to and acceptance of

said office of paymaster were of great public notoriety, and the people of Storey county were as well advised of these facts, and that a vacancy existed in the said office of state senator, as the governor or any other person. Held, that said election for state senator was a valid election, and that none of the five hundred and ninety-five ballots cast as aforesaid should be rejected in the count for relator by reason of being so cast, or because of a cross being made thereon opposite the name of J. A. Conboie.

Registration: It is alleged by the answer that in the city and township of Reno there were more than three hundred names of persons illegally placed on the register of voters by parties other than the registry agent, and that more than two hundred of these persons thus illegally registered cast their ballots for the relator, and that said ballots were canvassed and counted for him. It is contended by counsel for respondent, as we understand, that the votes of these persons should be excluded from the count in this case, or, if that be impracticable, that the election held in Reno be declared void, so far as the governorship is concerned. It is not alleged, nor was it attempted to be shown, that said three hundred persons, or any of them, were not duly qualified electors, by reason of the want of any of the electoral qualifications prescribed by the constitution.

The evidence as to said registration is that the registry agent, by reason of being sick for ten or twelve days immediately preceding the statutory time for closing the registration, was unable to attend to the registration of the voters, and he requested W. D. McNeilly, the constable, who had his office in the room with the registry agent, to take the names of persons applying for registration in his absence, and enter them on the official register. Subsequently, the registry agent certified the names of all of these persons to the inspectors of election in the several wards of Reno, with the names of the persons he had registered himself. Most of these persons, if not all, voted at said election. McNeilly testified that he registered no one about whose right to registration he had any doubt; that he consulted the district attorney and the chairman of the board of county commissioners, ¹⁷⁵ and they advised him to go ahead and register the voters. Although there is no evidence tending to show bad faith on the part of anyone, and we are of the opinion that all connected with said registration acted in good faith, yet such registration was without authority of law. The provisions of the registration law for ascertaining whether the applicant for reg-

istration is legally entitled thereto should be strictly followed. This was not done in the registration in question. Besides, no one is legally authorized to register voters, except justices of the peace and other persons duly appointed and qualified as provided by statute for that purpose.

While the statute provides for filling a vacancy occasioned by death or resignation of the registry agent, there is no provision for the registration of voters in case of any other disability of the agent. By section 14 of the registry law, the fact that the name of a person offering to vote appears in the check list and copy of the official register furnished the inspectors by the regular registry agent is *prima facie* evidence of such person's right to vote. The inspectors have no right to refuse to receive his vote, except upon his failure to prove his identity as the person who was registered in that name, when required to do so under the provision of said section. "They are only ministerial officers in such a case, and have no discretion but to obey the law and receive the vote": *Cooley's Constitutional Limitations*, 617; *Wolcott v. Holcomb*, 97 Mich. 361, 56 N. W. 837.

Under the above facts and circumstances, we are of the opinion that the ballots of the said persons so registered should not be rejected on account of said irregular or illegal registration.

Nonresident Voters: It is alleged by the complaint that several persons named voted for the respondent at certain precincts who were not residents of the county, and like allegations are made by the answer with respect to persons who voted for the relator, but neither party produced any evidence to sustain such allegations. It is alleged by the complaint that in certain precincts in Lander county some twenty or more persons named voted for respondent who were not residents of the precinct, but residents of other precincts in ¹⁷⁶ the county, and similar allegations are made with respect to certain persons having voted for respondent in Nye, Eureka, and Humboldt counties, precincts other than that of their residence. The answer contains like allegations with respect to persons who voted for the relator in several counties. As to the residence required as a condition to the right of voting, the constitution provides that six months' actual residence in the state, and thirty days' in the district or county, next preceding any election, shall entitle every person to vote for all officers to be elected by the people.

The statute makes it the duty of the county commissioners to establish election precincts and define the boundaries thereof, but if there be an election precinct established in any county,

with the boundaries so defined that the courts or the electors may determine the territorial extent of the precinct, it has not been shown in this case. In a county where there are no election precincts properly established and bounded, an elector of the county, properly registered by any registry agent therein, can legally take the certificate prescribed by section 10 of the registration law, which will entitle him to have his name registered at any other polling place in the same county at any time before the delivery of the certified copy of the register to the inspectors of the election, and when so registered he will be entitled to vote at such polling place.

Errors of Inspectors: It is alleged by relator, in substance, that in certain precincts of the several counties legal ballots were cast for him, but not counted by the inspectors; that in certain precincts a certain number of ballots, amounting in the aggregate to several hundred, which contained distinguishing and identifying marks, such as to render them void, were cast and counted for the respondent. By the answer it is likewise alleged that a certain number of legal ballots in certain precincts were cast for respondent, but not counted for him, and that in certain precincts and counties a great number of illegal and void ballots, by reason of distinguishing and identifying marks made thereon, were cast and counted for the relator. In support of these allegations, respectively, the parties offered in evidence the ballots. In nearly every instance when the ballots were offered from a ¹⁷⁷ county or precinct, an objection to their introduction was made by the other party, on several grounds.

The ballots were produced in court by the present county clerks, whose testimony is clearly sufficient to show that the ballots were properly cared for after coming into their possession, but in most cases the ballots were shown to have been in the custody of other officers before being received by the clerks. These other officers were not present, and their testimony was not taken. The ballots were admitted under the objection, the court reserving the consideration of the objections until its examination of the ballots themselves, the official returns of the inspectors, and the ballots returned as rejected by them. From such examination it clearly appears that there was no marking of or tampering with any of the ballots after leaving the hands of the voters that impeaches their validity. All of the objections to the introduction of the ballots in evidence are overruled.

The Ballots: The relator and the respondent, by their respective counsel, examined all the ballots cast in the state, in open

court, except from four precincts, in which the official returns show that sixty votes were cast for relator and one hundred for the respondent; and each party objected to certain ballots, on the alleged grounds that they contained distinguishing and identifying marks, and by reason thereof were void, and should not have been counted by the inspectors, and should not be counted by the court. The relator objected to five hundred and sixty-four ballots cast for respondent, and the respondent objected to five hundred and ninety-three ballots cast for the relator. There were six thousand and eighteen ballots cast for the two candidates to which no objection was made by either party. Of these ballots the relator received two thousand nine hundred and seventy-nine, and the respondent three thousand and thirty-nine. Of the ballots cast for respondent, and counted for him by the inspectors, to which the relator objected on the ground that they contained illegal, identifying, and distinguishing marks, the court rejected one hundred and thirty-five, upon the ground specified.

Of the ballots cast for relator, and counted for him by the inspectors, to which the respondent objected on the same ground, not including the so-called red-line ballots, the court rejected one hundred and nineteen. Deducting the one hundred and thirty-five ballots from three thousand five hundred and seventy counted for respondent, as shown by the official returns leaves him ¹⁷⁸ three thousand four hundred and thirty-five votes. Deducting the one hundred and nineteen ballots from three thousand five hundred and forty-eight counted for the relator as shown by said returns leaves him three thousand four hundred and twenty-nine votes. The inspectors rejected in the aggregate five legal ballots cast for the relator, and by errors otherwise in the counts made his vote six less in the aggregate than he properly received. In one precinct two more votes were counted than were cast for him. The relator's net gains are nine votes. The inspectors rejected in the aggregate twelve legal ballots cast for the respondent, and by errors otherwise in the count made his vote two less than he received, and by like errors in other precincts he was given three more votes in the aggregate than were cast for him. The respondent's net gains are eleven votes. To the above number of votes cast for the relator we add his said net gain, making his total vote three thousand four hundred and thirty-eight. To the above number of votes cast for the respondent we add his said net gain, making his total vote three thousand four hundred and forty-six—a majority

over the relator of eight votes, not considering the fifty-five red-line ballots cast for the relator, which, as will be seen below, the court rejected on the grounds therein given.

Objections: We come now to the consideration of the objections made to the ballots offered by the respective parties. The necessarily hasty examination of a part of the relator's objections to ballots, made during a temporary adjournment of court, and without a copy of the reporter's notes, resulted, as we anticipated, in some mistakes in overlooking objections made, to which counsel on both sides subsequently called our attention. We have again examined all the ballots, and carefully noted the objections taken thereto, as shown by the copy of the reporter's notes, and have endeavored to correct any such errors—errors mainly due to rulings upon objections to ballots which had been rejected by the election officers, and in some cases where the markings rendering the ballots void were, from their position and character, not easily detected during the hasty examination given. It is sufficient to say that, in the absence of any averment or proof of fraud or corruption on the part of any person at the election, we have considered the constitutional right of the electors, as well as the rights of the relator and respondent, in all the rulings upon objections to the separate ballot, and have held ballots good and valid in all instances ¹⁷⁹ where such ruling was not in violation of the spirit and strict letter of the law, and have thereby followed the rulings of this court in the earlier cases coming under the provisions of that law.

We have also taken into consideration the fact that the markings required to be made by the elector as indicating his choice of candidates must be made by pencil, by as many different persons as there were ballots cast; that there were electors of different ages, conditions of health, and of different experience in the use of pencils. We have also taken into consideration the place required by law where the markings were made. We have also considered the fact that the law does not, and could not possibly, specify the size, the length of the lines composing the cross, or the angle at which these lines should cross each other, that no two persons make the same kind or character of a cross with a pencil, and that it is a rare occurrence that the same person makes the same kind or character of a cross with the same pencil under the conditions imposed.

We have, therefore, overruled objections to the validity of ballots based upon the following alleged bad markings: In all cases where the elector had attempted to make the cross, and had actu-

ally made the so-called letters "Y," "T," inverted "T," "V," inverted "V"; also, where the cross made resembles the figure "4"; also, the so-called double crosses, where it is apparent the voter had attempted to retrace the lines composing the cross; also, crosses made by curved or irregular lines, evidently the result of nervousness or physical infirmity, or the roughness of the boards upon which the ballot was placed for markings; also, accidental pencil markings; also, ink blotches, evidently the result of accident on the part of the election officers; also, dirty finger-marks; also, crosses indiscriminately appearing upon the face of the ballots, where it is evident such crosses were simply the impressions of crosses made in the proper places upon the ballots with a soft lead pencil, and such impressions were made by the folding of the ballots (of this class there were a very large number of ballots); also, ballots with words written thereon in pencil or ink, where it is apparent from the position of the words upon the ballot, the import of the words themselves, **180** and the character of the writing, that the same was done by the election officers after the ballot had been marked and cast by the voter; also, ballots marked with large and heavy crosses in proper place; also, accidental pencil dots and fine and irregular pencil-marks; also, slight attempted erasure of crosses made by the bare finger; also, crosses found upon the back of the ballots, where it is apparent that the same were made from the impression of the pencil in the attempt of the voter to properly mark his ballot resting upon a stained or dirty board; also, some of the so-called stars, evidently the result of an attempt to retrace the lines composing a cross, or an attempt to retrace such lines by one with a nervous hand, or upon rough boards; also, crosses made with a slight hook at one or the other end of the lines forming them.

Many objections were also made to ballots based upon the form and irregularity of the crosses, which we do not deem it necessary to specifically name.

Objections to ballots which have been sustained are in the main based upon the following kind or character of marks: Ballots with horizontal lines thereon; ballots marked with a capital "W," and a horizontal line crossing the same; ballots in some instances marked with a perpendicular or vertical line; ballots marked with a circular loop; ballots marked with crosses, and the same erased or scratched out with a lead pencil; ballots with erasures sufficient to deface and destroy the texture of the paper; ballots with words written thereon, in all cases where it

is apparent that the words were written by the elector, or by some other person unauthorized, before the same were cast by the elector; ballots with crosses on the margin thereof, and not after the names of candidates to be voted for; a ballot with the letter "D" of "A. D.," in the official heading thereof, scratched over deliberately with a lead pencil; ballots marked with crosses not after the names of any candidates to be voted for, but placed after the designation of the office; ballots with crosses placed immediately between the printed names of the candidates; some ballots marked with stars and with marks resembling spiders; ballots with the cross and also a figure "1" placed thereafter; ballots where the elector had voted for the proper number of ¹⁸¹ candidates for some office, and had also placed an additional cross in the proper place after the blank space left for the writing in of the name of any candidate nominated to fill a vacancy; ballots where the elector had scratched off with a pencil words or names printed thereon; ballots where two crosses are made after the name of a candidate voted for; ballots marked with a cross in proper place, and inclosed with the letter "O," or circular lead pencil-mark; a ballot bearing no cross, but with a perpendicular pencil-mark in proper place after the names of all the candidates intended to be voted for; ballot with the letter "S," and a vertical line drawn through the same; ballots with the crosses placed immediately to the left of the names of the candidates voted for; ballots with equation marks between the printed names of the candidates and the party designation; ballots marked with two vertical lines not forming a cross (ballots whereon the voter had voted for more candidates for the same office than were to be elected were not held to be void, but such ballots, where the elector had attempted to vote, or had voted, for the relator and the respondent, or for the relator or respondent, and some one of the other candidates for governor, were not counted for either relator or respondent or other candidate for governor); ballots marked with the letter "N," and a horizontal line drawn across the same; a ballot with a cross in the letter "O" of the printed word "Official"; ballots marked with a blue or purple pencil; ballots marked with ink; ballots marked with the ordinary business check mark; ballots with the cross between the name of the officer to be elected and the instruction "Vote for One," etc.

Ballots with the crosses directly on the line between the candidates for governor, and in such a position as to prevent the

court from determining for what candidate the same were intended to be cast, have not been held to be void, but such ballots have not been counted for the office of governor, and other ballots bearing marks, the character of which renders it impossible to describe. We deem it necessary to say here that under the law we have held as valid and counted all ballots having a proper cross, not in the square prepared thereon in printing, but after and to the right of the names ¹⁸² of the candidates voted for. Accordingly specific objections to the various ballots marked as exhibits and filed in the action have been sustained as follows:

In Nye county, Union Canyon precinct, Relator's Exhibit No. 1; in Currant Creek precinct, Relator's Exhibit No. 3; Tybo precinct, Respondent's Exhibit No. 4.

Lyon county, Wabuska precinct, Relator's Exhibit No. 1; Dayton precinct, Relator's Exhibits Nos. 6, 8, 12, 15, and 16; Respondent's Exhibits Nos. 8, 9, 10, 13, 14, and 16; Silver City precinct, Relator's Exhibit No. 1 and Respondent's Exhibit No. 1; Mason Valley precinct, Relator's Exhibits Nos. 1, 2, 3, 4, 7, 8, 9, 10, and 11; Respondent's Exhibits Nos. 1, 2, 3, 5, 7, and 8; Sutro precinct, Relator's Exhibits Nos. 1 and 2. In Plummer precinct, Lyon county, objections to Relator's Exhibit No. 1 are sustained, and objections to Respondent's Exhibit No. 1 are also sustained.

Lincoln county, Delamar precinct, Relator's Exhibits Nos. 2, 31, 33, and 34. In the same precinct, Relator's Exhibit No. 16 is a ballot objected to because the cross is immediately on the line between the names of Sadler and Russell. Relator's Exhibit No. 9 is a ballot objected to for the reason that the elector had voted for both the respondent and McCullough for governor. The official returns show that the board of inspectors did not count either of these ballots for the respondent, and it is therefore unnecessary to pass upon the same, or consider them as a part of the final result. In the same precinct objections to Respondent's Exhibit No. 1 were sustained. In Pioche precinct objections to Relator's Exhibits Nos. 1, 3, and 4, are sustained, and objections to Respondent's Exhibits Nos. 1 and 2 are sustained. In this precinct one ballot was voted for both the respondent and relator, but the same was not counted in the official returns. In Mesquite precinct objections to Relator's Exhibit No. 1 are sustained. In Hiko precinct objection to Relator's Exhibit No. 2 is sustained. In Deer Lodge precinct objection to Respondent's Exhibit No. 1 is sustained. In Search-

light precinct objections to Relator's Exhibits Nos. 1 to 10, inclusive, are sustained. In Panaca precinct objections to Relator's Exhibit No. 1 are sustained.

Eureka county, Eureka precinct No. 1, objections to Relator's ¹⁸³ Exhibits Nos. 2, 10, 12, 25, 35, 38, 41, and 49, are sustained. The count made by the court in this precinct corresponds with the official returns, without considering the ballot voted for both respondent and relator, to which objection was made by both parties. In Palisade precinct, Relator's Exhibit No. 2, a ballot voted for both McCullough and the respondent, was not counted in the official returns, and is not counted by the court. In Ruby Hill precinct the count made by the court shows a gain of one vote for the relator over the official returns. In Beowawe precinct objections to Relator's Exhibits Nos. 2 and 4 are sustained. The count of this precinct made by the court shows that the respondent gains one vote, but, as it is evident that Relator's No. 2 was not counted by the board of inspectors, sustaining the objections thereto in no manner changes the returns as officially made.

In Lander county, Austin precinct No. 1, Relator's Exhibit No. 16, a ballot voted for the respondent and rejected by the board of inspectors, is a good and valid ballot, and should have been counted for the respondent. In the same precinct Relator's No. 17 is also a ballot voted for the respondent and rejected by the board of inspectors, but should have been counted, and is by the court counted for him. By reason of the above errors, the respondent gains two votes in this precinct. In Dean precinct, Relator's Exhibit No. 3, voted for both Sadler and Russell, was counted by the board for the respondent, but should have been rejected. In Austin precinct No. 2, objections to Relator's Exhibits Nos. 6, 8, and 11 are sustained. In the same precinct objections to Respondent's Exhibit No. 4 are sustained.

In White Pine county, Aurum precinct, objections to Relator's Exhibit No. 1 are sustained. In Osceola precinct objections to Relator's Exhibit No. 1 are sustained. The official returns of said precinct show that this exhibit was not counted by the board of inspectors, and sustaining the objections thereto makes no change in the official returns. In Ely precinct of the same county one hundred and forty electors cast their ballots. There were found in the returns of this precinct three blank ballots marked "Rejected" by the officers, two of which have the strip containing the number on the right-hand side. One of the three ballots voted for Russell was evidently and ¹⁸⁴ clearly re-

jected by the board because the crosses were made to the left of the names of the candidates. Two ballots were also found among the returns marked "Spoiled" by the inspectors. Four other ballots were found among the returns marked "Rejected." One of these last was offered by the relator, and objected to because the strip containing the number remained on the right-hand side thereof. As the ballot was evidently cast without the strip being detached, under the former rulings of this court the objection is not well taken, and the ballot should be counted for the relator. In the same precinct objections to Relator's Exhibits Nos. 2, 3 and 4, which were of the rejected ballots cast for respondent, and for the same reasons, should be counted for the respondent. Under these rulings the relator gains one vote, and the respondent three votes, in this precinct. In Hamilton precinct of the same county, objections to Respondent's Exhibits Nos. 1 and 3 are sustained. The respondent loses one vote in this precinct, as shown by the count made by the court. In Cherry Creek precinct of the same county, objections to Relator's Exhibits Nos. 1 and 3 are sustained. Objections to Relator's Exhibit No. 5, which is a ballot voted for the respondent and rejected by the board of inspectors, are overruled, and this ballot counted for the respondent. Objections to Relator's Exhibit No. 8, which is a ballot voted for the respondent and rejected by the board of inspectors, are overruled, and this ballot should be counted for the respondent. Objections to Relator's No. 9, another ballot rejected by the board of inspectors and voted for the respondent, are overruled, and this ballot counted for the respondent. By these rulings the respondent gains three votes in this precinct. In White River precinct, of the same county, objections to Relator's Exhibit No. 1 are sustained.

In Elko county, Lamoille precinct, objections to Relator's Exhibits Nos. 1, 6, and 11 are sustained. In Ruby Valley precinct, of the same county, objections to Respondent's Exhibit No. 3 are sustained. In North Fork precinct, of the same county, the count made by the court shows a loss of one vote for the respondent. In Tuscarora precinct objections to Relator's Exhibit No. 18, a ballot cast for the respondent and rejected by the board of inspectors, and overlooked by ¹⁸⁵ the court in the former examination of the ballots, are overruled, and the ballot counted for the respondent. In the same precinct objections to Respondent's Exhibits Nos. 21, 22, and 23, which are ballots cast for the relator and rejected by the board of inspectors, objections to two of which ballots were overlooked by the court

in its former examination, are overruled, and these ballots are counted for the relator. By these rulings the respondent gains one vote, and the relator three votes, over the official count in this precinct. In North Ruby precinct, of the same county, objections to Relator's Exhibits Nos. 2 and 3 are sustained. In the same precinct objections to Respondent's Exhibit No. 5 are sustained. In Elko precinct respondent's objections to Exhibit No. 17, a ballot cast for the relator and rejected by the board of inspectors, are overruled, and the ballot counted for the relator. By this ruling the relator gains one vote over the official count in this precinct. In Halleck Station precinct, of said county, objections to Relator's Exhibits Nos. 1, 4, 7, 9, 11, 12, 13, 14, and 15 are sustained. In the same precinct the count by the court shows a gain of one vote in favor of the respondent over the official returns. This difference may be accounted for from the fact that Relator's No. 6 (a Sadler ballot) was not counted by the board of inspectors, and is counted by the court. In either event the respondent gains one vote in the count. In Wells precinct, of said county, objections to Respondent's Nos. 1 and 10 are sustained. In Toano precinct, of said county, objections to Respondent's Exhibits Nos. 1, 2, 3, and 5 are sustained. In Tecoma precinct, of said county, objections to Relator's Exhibits Nos. 1 to 4, inclusive, are sustained. In the same precinct objections to Respondent's Exhibits Nos. 1 to 6, inclusive, are sustained.

In Humboldt county, Lovelock precinct, objections to Respondent's Exhibits Nos. 16 and 19 are sustained. In Kennedy precinct, of the same county, objections to Relator's Exhibit No. 1 are sustained. Objections to Relator's Exhibit No. 7, which is a ballot cast for the respondent and rejected by the inspectors, are overruled, and this ballot counted for the respondent. By this ruling the respondent gains one vote over the official count in this precinct. In Winnemucca precinct of said county objections to Relator's Exhibits Nos. 4 ¹⁸⁶ and 12 are sustained. In the same precinct objections to Respondent's Exhibits Nos. 9, 12, and 16 are sustained. In Mill City precinct, of said county, objections to Relator's Exhibit No. 1 are sustained. In Unionville precinct, of the same county, objections to Relator's Exhibit No. 1 are sustained. In McDermitt precinct, of the same county, objections to Relator's Exhibit No. 1, a ballot cast for the respondent and rejected by the board of inspectors, are overruled, and this ballot counted for the respondent. In Golconda precinct, of the same county, objections to Respondent's

Exhibit No. 3 are sustained. In Sulphur Mine precinct, of the same county, objections to Respondent's Exhibit No. 1 are sustained.

In Churchill county, Stillwater precinct, objections to Respondent's Exhibit No. 1 are sustained. In New River precinct, of the same county, objections to Respondent's Exhibit No. 2 are sustained.

In Esmeralda county, Hawthorne precinct, objections to Relator's Exhibits Nos. 2 and 3 are sustained. In the same precinct objections to Respondent's Exhibit No. 3 are sustained. In Pine Grove precinct, of the same county, objections to Respondent's Exhibit No. 1 are sustained. In Aurora precinct, of the same county, objections to Respondent's Exhibit No. 1 are sustained. In Douglas precinct, of said county, objections to Relator's Exhibit No. 9 are sustained. In the same precinct objections to Respondent's Exhibit No. 1 are sustained. By sustaining the objections to the last-named exhibit, the returns correspond with the official count, and it is probable that this ballot was not counted by the inspectors for either candidate for governor. In Candelaria precinct, of the same county, objections to Relator's Exhibits Nos. 2 and 3 are sustained.

In Douglas county, Genoa precinct, objections to Relator's Exhibit No. 1 are sustained. In the same precinct objections to Respondent's Exhibits Nos. 1, 2, 3, 4, 5, and 6 are sustained. In Mottsville precinct, of the same county, objections to Relator's Exhibit No. 1 are sustained, and objections to Respondent's Exhibit No. 1 are sustained. In Cave Rock precinct, of the same county, objections to Respondent's Exhibit No. 2 are sustained. In East Fork or Gardnerville precinct, of the same county, objections to Relator's Exhibits ¹⁸⁷ Nos. 3, 4, 5, and 6 are sustained, and in the same precinct objections to Respondent's Exhibits Nos. 1, 2, and 4 are sustained. In Jack's Valley precinct, of the same county, objections to Relator's Exhibit No. 1 are sustained, and the objections to Respondent's Exhibit No. 1 are also sustained.

In Ormsby county, first ward of Carson City, objections to Relator's Exhibits Nos. 1, 2, 3, 6, 9, and 10 are sustained. In the same precinct objections to Respondent's Exhibit No. 3 are sustained. In the second ward of Carson City objections to Relator's Exhibits Nos. 1, 3, 4, 5, 6, 7, 9, 11, and 12 are sustained. In the same ward objections to Respondent's Exhibits Nos. 2, 3, 4, 5, 11, and 12 are sustained. In Empire precinct, of the same county, objections to Relator's Exhibits Nos. 1 and 2 are sustained.

In Washoe county, Wadsworth precinct, objections to Respondent's Exhibits Nos. 2, 11, 12, and 18 are sustained. In this precinct, also, the count made by the court shows a loss of one vote by the respondent. In Huffaker's precinct, of the same county, objections to Respondent's Exhibit No. 2 are sustained. In Verdi precinct, of the same county, objections to Relator's Exhibit No. 2 are sustained. In the same precinct objections to Respondent's Exhibit No. 1 are sustained. In the first ward of Reno, of said county, objections to Respondent's Exhibits Nos. 2 and 4 are sustained. In this ward the count made by the court shows a gain of two votes over the official count for the relator. In the third ward of Reno, same county, objections to Relator's Exhibits Nos. 2, 3, 4, and 6 are sustained. In the same ward objections to Respondent's Exhibits Nos. 8, 9, and 10 are sustained. In the fourth ward of Reno objections to Respondent's Exhibits Nos. 5 and 9 are sustained. In the fifth ward of Reno objections to Relator's Exhibit No. 2 are sustained. In the same ward objections to Respondent's Exhibits Nos. 3, 4, 5, and 9 are sustained. By the count by the court the relator also loses two votes in this ward.

In Storey county, first ward Virginia City, objections to Relator's Exhibits Nos. 1, 2, 3, 4, 5, 6, 10, 11, and 12, are sustained. In the same ward objections to Respondent's Exhibits Nos. 1, 6, 10, 14, 15, 16, 18, and 19, are sustained. In the same ward Relator's Exhibit No. 13, a ballot voted for the ¹⁸⁸ respondent and rejected by the board of inspectors, should be counted for the respondent. In the second ward of Virginia City objections to Relator's Exhibits Nos. 2, 3, 5, and 6 are sustained. In the same ward objections to Respondent's Exhibits Nos. 2, 3, 5, 7, 8, 9, and 10 are sustained. In this ward both the relator and the respondent gain one vote over the official count. In the third ward of Virginia City objections to the Relator's Exhibit No. 6 are sustained. In the same ward objections to Respondent's Exhibits Nos. 1, 2, 7, 9, 10, 11, 12, 17, 19, and 23, are sustained. In the fourth ward of Virginia City objections to Relator's Exhibits Nos. 1 and 2 are sustained. In the same ward objections to Respondent's Exhibits Nos. 1, 4, 6, 7, and 8 are sustained. In Gold Hill precinct, of the same county, objections to Relator's Exhibits Nos. 1, 2, and 5 are sustained. In the same precinct objections to Respondent's Exhibits Nos. 34, 55, 60, 63, and 64 are sustained.

The consideration of the objections made to the so-called red-line ballots cast in Gold Hill precinct, of this county, presents in many respects a new question—one differing in important

points from any other question heretofore considered and determined by this court in any of the cases arising under our Australian ballot or election law. The facts, briefly stated, are that one H. J. Maguire was duly nominated by petition as an independent candidate for member of the assembly from Storey county. The republican and silver parties had also nominated candidates for the full representation of that county for the same office. The duly certified list of candidates for office, including the name of Maguire, had been published in the newspaper as required by law. The official ballots, printed upon the official ballot paper furnished by the secretary of state, had been printed, upon which appeared the name of the said Maguire as an independent candidate for member of the assembly. The sample ballots required by the act, upon which also appeared the name of Maguire, as an independent candidate for the assembly, had also been duly printed and distributed as required by law. Every step required for the information of the electors of Storey county had been properly taken by the officers authorized to act.

180 After all these steps had been taken, and on the third or fourth day preceding the election, the said Maguire presented the county clerk of that county with his resignation as a candidate for the office to which he had been duly nominated, which resignation the clerk accepted. The clerk then made requisition upon the secretary of state for additional ballot paper to print and prepare the full allotment due that county as shown by the registration, without the name of Maguire printed thereon. The secretary of state was not able to furnish him with a sufficient quantity of such paper to print the full allotment of ballots for the county, but did supply him with sufficient paper to print a number of ballots largely in excess of the number of votes cast in the county. The clerk, acting in good faith, took a large number of the ballots already printed, containing the name of Maguire, and drew red lines with ink through his name and, together with the ballots last prepared without the name of Maguire printed thereon, and with those with the name of Maguire through which the red lines had been drawn, supplied the various election officers with the full allotment of ballots, but with instructions to the officers not to give out to the electors any of the ballots bearing the red lines until after the others had been exhausted.

In all precincts in Storey county, excepting Gold Hill, no ballots were cast bearing the red lines. In Gold Hill precinct the greater number of the ballots cast were those last prepared,

without the name of Maguire, and without the red lines. The election officers of Gold Hill precinct returned nearly two hundred ballots of the last prepared as not having been voted, and still in book form. About fifty-five of ballots bearing the red line through the name of the said Maguire were cast and counted in Gold Hill precinct for the relator, to which respondent has made objections.

The chief purpose and object of the enactment of our Australian ballot law were to prevent fraud and corruption at the elections. As the most potent means for this purpose, it requires that the ballots shall be printed upon the same kind of paper for the various counties and precincts of the state, to be furnished by officers authorized in the matter by the law. Not only is uniformity in paper required, but uniformity ¹⁹⁰ in printing is regarded as essential to secure the secrecy of the ballot, through which fraud and corruption are to be prevented. In keeping with these requirements of the law, the legislature required that the elector should use the cross, or a uniform system of marking his ballot, as indicating his choice or preference of candidates, in a booth constructed so as to shield him from the observance of persons other than the election officers.

In other words, the legislature sought, by a uniform system of voting, including a uniform kind or character of ballots, and the printing of the same, and the markings made, to render the ballots cast absolutely secret. Therefore, uniformity in kind or character of paper used for ballots throughout the state, uniformity in printing ballots for the various precincts throughout the state, and uniformity in the character of markings, as nearly as practicable, by all electors, are the very foundation and basis of our election law. No provision is made whatever, in direct terms, for the resignation of a candidate nominated for a public office. If such right exists, it arises solely by implication, under a strained construction of the latter clauses of section 7 of the Australian ballot law, as found in the Statutes of 1893, page 113. If the clause of that provision by implication authorizes the resignation of a candidate for office, by the same rule of construction must it be said that the resignation must be sent to the convention making the nomination, or a committee appointed by such convention, with delegated authority to fill vacancies, or the petitioners nominating such candidate.

Whatever view may be taken of this provision of the law, it is evident that the officer is authorized to print or write only the name of the person substituted to fill the vacancy caused by

such resignation. In no event is he authorized, directly or indirectly, to make other changes upon the face of the printed ballot. When we stop to consider it—changes necessary to be made upon the tickets of the entire state, caused by a resignation of a candidate for a state office—the impracticability of this provision of the law is clearly made apparent. But, be the operation and effect of this provision of the law what it may, it is clear that any attempted changes in the face of the ballot as printed, whereby more than one ¹⁹¹ kind of official ballot is prepared and distributed to a precinct of the county, is clearly in conflict with the spirit and letter of the law requiring uniformity in the ballots. Any other construction placed upon the law would, in case of numerous resignations made immediately preceding the day of election, confer authority upon the officer to erase from a part of the printed ballots of any precinct the names of different candidates for various offices, with different colored inks or pencils, and thus render it possible to have cast in such precinct different official ballots, distinguishable upon their faces, and only dependent as to number upon the excess of the quantity of official ballot paper which may remain in the hands of the secretary of state after making the proper allotment to the various counties.

If two kinds of ballots can be used in the same precinct, then, under like conditions, many different kinds and forms can likewise be used, and the basis of the law thereby destroyed, leaving its provisions a dead letter upon the books. That this uniformity in ballots might be effectual, and the voter also protected in his constitutional right, and to meet the contingency arising from the facts in this case, the legislature has made ample provision. It is provided by section 16 of the act that: "In case of prevention of an election in any precinct by reason of the loss or destruction of the ballots intended for that precinct, or for any other cause, the inspector or other election officer for the precinct shall make an affidavit setting forth the fact and transmit it to the governor of the state. Upon receipt of such affidavit, and upon the application of any candidate for any office to be voted for by the voters of such precinct, the governor shall order a new election in such precinct": Laws 1891, p. 43.

It will be thus seen that had the secretary of state no ballot paper whatever, and had the resignation of Maguire been proper, and had it been necessary to prepare and print ballots upon official ballot paper, and in the form required for Gold Hill precinct, the voters of that precinct, upon the showing required, could have had an opportunity of expressing their choice for any

and all candidates for office at a different time and in due form of law. We must therefore conclude that, rather than destroy the spirit of the law—rather than ¹⁹² destroy its substance—where ample provision is made for the protection of the elector in his rights and for the protection of the candidates in their rights, these ballots bearing the red lines must be excluded. It is claimed that this question has been practically settled the other way by the decision of this court in *Sweeney v. Hjul*, 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169, and in passing upon the demurrer of the relator to that of respondent's answer in this action involving the validity of the ballots cast in Reno precinct.

This claim is not tenable. All the ballots in Eureka county passed upon in *Sweeney v. Hjul*, 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169, and all the ballots voted in Reno precinct and passed upon by the court in this action, were uniform—had printed thereon the names of all the candidates. In this action the ballots under consideration have been cast in the same precinct, with the name of Maguire printed thereon, with red lines drawn through the same, and other ballots have been cast in the same precinct, as official, without the name of Maguire printed thereon, and without the red lines thereon. In other language, the ballots cast in Eureka county and in Reno precinct were uniform, and in strict accordance with the spirit and letter of the law.

In Bullion precinct, in Lander county (overlooked in its proper place in the preparation of the opinion), the relator gains one vote over the official count. In East Fork or Gardnerville precinct, of Douglas county, the relator gains one vote over the official count.

We believe it proper to suggest that certain amendments to the law as it exists will obviate many, if not all, of the objections made to the validity of the ballots. It is impossible, under the present system of marking with a pencil, to obtain uniformity in form of markings. This difficulty can be overcome by requiring, as in other states, that the markings shall be made with a rubber stamp. Many objections were also made to ballots because of writing thereon made by election officials. This should be strictly prohibited by the law, except in case of rejected ballots, and in those cases the inspectors should be required to certify over their names, upon the back of the ballot, that it was rejected by them in the count, briefly stating their reasons therefor. We also suggest that the law be so amended as to require, in direct ¹⁹³ and specific terms, the place or position where the elector shall make his cross as indicating his choice

of candidates. With these amendments, the law which has been so beneficial in its results, and accomplished so much for the purification of our elections, would be nearly perfect, and nearly, if not quite, all vexatious litigation which has grown up by reason of these defects avoided.

It is gratifying to be able to state that in this protracted proceeding, in which the respective counsel spared neither time nor energy in their efforts to present to the court such facts, if existing, as would impeach the integrity of the votes cast for the opposing candidate in the several counties, no evidence was found to cast a suspicion upon the good faith or integrity of any candidate, officer, or elector. It clearly appears that said election was entirely free from bribery, intimidation, and coercion, which it is said prevail at elections in other states. The illegal markings found upon ballots which necessitated their rejection in this case resulted from the carelessness of voters, and the lack of paying attention to the simple mandatory provisions of the statute.

Finally, the court finds from the evidence that Reinhold Sadler, the respondent, received at said election for the office of governor of the state of Nevada three thousand four hundred and forty-six legal votes, and no more; that William McMillan, the relator, received at said election for the said office three thousand three hundred and eighty-three legal votes, and no more; and, as conclusions of law, the court finds that said Reinhold Sadler was duly elected to said office for the term of four years from the first Monday in January, A. D. 1899, and is now entitled thereto, and that he be entitled to a judgment to that effect, and judgment against said William McMillan, the relator, for his costs expended in this proceeding.

Judgment is ordered to be entered accordingly.

ELECTIONS.—MARKS UPON THE FACE OF BALLOTS made accidentally and not to indicate the voter, and changes for which a reasonable explanation consistent with honesty and good faith, either appears on the ballots or is shown by proof, do not invalidate them: *Coughlin v. McElroy*, 72 Conn. 99, 77 Am. St. Rep. 301, 43 Atl. 854. See, further, the monographic note to *Taylor v. Bleakley*, 49 Am. St. Rep. 240;249, on the effect of distinguishing marks on ballots.

ELECTION LAWS.—COURTS WILL CONSIDER the chief purpose of election laws so far as to obtain a fair election and honest return as paramount in importance to minor requirements which prescribe the formal steps to reach that end; and in order not to defeat the main design, are frequently led to ignore such irregularities as are free from fraud and have not interfered with a full and fair expression of the voter's will: *Bowers v. Smith*, 111 Mo. 45, 33 Am. St. Rep. 491, 20 S. W. 101. Statutes tending to limit the citi-

zen in the exercise of the right to vote should be construed liberally in his favor: *State v. Saxon*, 30 Fla. 668, 32 Am. St. Rep. 46, 12 South. 218. Statutes relating to the mode of procedure in elections, and to the record and return of results, are directory merely: *State v. Russell*, 34 Neb. 116, 33 Am. St. Rep. 625, 51 N. W. 465. Provisions that the voting marks on ballots shall be in ink are directory: *State v. Russell*, 34 Neb. 116, 33 Am. St. Rep. 625, 51 N. W. 465. On the general statutory requirements as to marking ballots, see the note to *Taylor v. Bleakley*, 49 Am. St. Rep. 240-243.

EX PARTE DELA.

[25 Nev. 346, 60 Pac. 217.]

CRIMINAL LAW—RIGHT TO HOLD PRISONER.—RECITALS IN A COMMITMENT as to mere matters of procedure, and which are no part of the judgment, do not affect or impair the right of a warden to detain a prisoner.

CRIMINAL LAW — JUDGMENT — COMMITMENT.—THE TWO ESSENTIALS to a valid judgment of conviction, and a process of commitment issued thereon, are the statement defining the punishment, and the statement of the offense for which the punishment is inflicted.

HABEAS CORPUS.—THE JURISDICTION OF A COURT or judge to render a particular judgment or sentence by which a person is imprisoned, is always a proper subject of inquiry on habeas corpus.

HABEAS CORPUS—QUESTIONS TO BE DETERMINED.—While a court on habeas corpus has no power to inquire into mere irregularities of procedure which are properly reviewable on appeal, it will inquire into the jurisdiction of the court rendering the judgment, to ascertain whether it is void for want or excess of jurisdiction, and to ascertain whether the process issued on such judgment under which the petitioner is held is also void.

CRIMINAL LAW — MURDER — STATUTE FIXING DEGREES OF.—A statute which makes all murder committed in the perpetration of arson, rape, robbery, or burglary murder in the first degree, does not create a new crime, but merely makes a distinction with a view of different degrees of punishment, based upon different grades of crime.

CRIMINAL LAW — MURDER — PREMEDITATION — ATTEMPT TO COMMIT OTHER FELONY.—The perpetration of, or the attempt to perpetrate, arson, rape, robbery, or burglary, during which a homicide is committed, stands in lieu of premeditation and deliberation otherwise necessary to constitute murder in the first degree.

CRIMINAL LAW—INDICTMENT FOR MURDER—CONVICTION OF RAPE.—UNDER A CONSTITUTION providing that no person shall be tried for a capital or other infamous crime except on presentment or indictment of a grand jury, a person who has been indicted and tried for murder cannot be convicted of the crime of rape.

A. J. McGowan, for the petitioner.

W. D. Jones, attorney general, contra.

347 MASSEY, J. The facts shown by the petition, the return of the warden, and otherwise, are all conceded. It was shown that the petitioner was indicted by the grand jury of Lincoln county on the thirty-first day of October, 1895, for the crime of murder committed on the thirteenth day of October, 1895; that he was tried therefor on the thirteenth day of November, 1895, in the district court of the fourth judicial district of the state of Nevada, in and for Lincoln county, by a jury, and convicted of the crime of rape; that on the sixteenth day of November, 1895, he was sentenced to serve a term of twenty years in the state prison, upon a judgment based upon said verdict convicting him of the crime of rape. The indictment upon which he was tried charges him with having committed the crime of murder in the perpetration of rape upon one Liza, an Indian girl under the age of fourteen years. The commitment set up in the return of the warden, after properly stating the court and cause, recites: 348 "This being the time set for passing sentence, the defendant, with his attorney, F. X. Murphy, Esq., together with the district attorney, T. J. Osborne, Esq., are in court. The defendant, Joseph Dela, was then informed by the court of an indictment having been found against him by the grand jury of Lincoln county, state of Nevada, on October 31, A. D. 1895, for the crime of murder, alleged to have been committed on or about the thirteenth day of October, 1895, at the said Lincoln county, and the state of Nevada; of his arraignment thereon on the fourth day of November, A. D. 1895; of his plea of not guilty as charged in the indictment on the fourth day of November, A. D. 1895, and of said plea being duly entered; of his trial and the verdict of the jury on the fourteenth day of November, A. D. 1895. The defendant was then asked by the court if he had any legal cause to show why judgment should not be pronounced against him; no legal cause appearing, or being shown to the court why judgment should not be pronounced in this case, the court rendered its judgment, and 'it is ordered, adjudged, and decreed that you, Joseph Dela, be punished for the crime of which you have been convicted in this court, by being incarcerated in the state prison of the state of Nevada for the term of twenty years. Defendant is remanded to the custody of the sheriff.'"

The clerk of the court certifies that the foregoing is a full,

true, and correct copy of the original judgment in the case of the state of Nevada against Joseph Dela.

The verdict returned, after reciting the court and cause, is as follows: "We, the jury in the above-entitled action, find the defendant guilty of rape. I. N. Garrison, Foreman."

The petitioner claims that under the showing made by the petition, return of the warden, and the record, the court exceeded its jurisdiction in rendering the judgment and imposing the sentence, and it is therefore null and void, and that the process issued thereon does not warrant his detention.

Against this claim it is contended that the commitment set up in the return of the warden shows that the petitioner is restrained of his liberty pursuant to a valid judgment of a competent court of criminal jurisdiction, and a valid process issued thereon; that the court had jurisdiction of the person of the petitioner and the subject matter, namely, the ³⁴⁹ crime of murder, charged in the indictment; and that such showing not only authorizes his detention, but is conclusive, and cannot be attacked or impeached on habeas corpus. Is the commitment valid, and does it show a valid judgment of a court of competent jurisdiction?

By section 450 of our Criminal Procedure (Gen. Stats. 4330) it is required that, when judgment upon a conviction is rendered, the clerk shall enter the same in the minutes, stating briefly the offense for which the conviction has been had, and shall within five days annex together and file the following papers, which shall constitute the record of the action: 1. A copy of the minutes of any challenge which may have been interposed by the defendant to the panel of the grand jury, or any individual grand juror, and the proceedings thereon; 2. The indictment and a copy of the minutes of the plea or demurrer; 3. A copy of the minutes of any challenge which may have been interposed to the panel of the trial jury, or an individual juror, and the proceedings thereon; 4. A copy of the minutes of the trial; 5. A copy of the minutes of the judgment; 6. The bill of exceptions, if there be one; 7. The written charges asked of the court, if there be any.

By section 451 of the same act it is provided that a certified copy of the entry of the judgment, as required in section 450, *supra*, shall be furnished forthwith to the officer whose duty it is to execute the judgment, and that no other warrant or authority is necessary to justify or require the execution thereof, except when judgment of death is rendered.

We have, then, before us, as a part of the warden's return, a full and complete copy of the judgment. In one essential matter it fails to comply with the requirements of section 450. It does not briefly, or in any manner, state the offense for which the petitioner had been convicted. We cannot know, nor can the warden know, therefrom, the offense for which the prisoner was convicted and committed.

It appears from the judgment that the petitioner was convicted of some crime, but it is left to be surmised what the crime is. It might be claimed, as it was claimed on the argument, that the recitals of the commitment at the time of passing sentence, to the effect that the court informed the ³⁵⁰ petitioner of the finding of the indictment against him for murder, of his arraignment, plea, trial, and of the verdict, were sufficient to raise a presumption that he had been convicted of the crime of murder in the second degree. But these recitals are no part of the judgment, and are only in keeping with the requirements of a preceding section of the same act (section 444) as to mere matters of procedure, and not of substantive law, which, if not included in the commitment, would not affect or impair the right of the warden to detain the petitioner. This has been practically so held by this court.

In *Ex parte Salge*, 1 Nev. 453, it was held that a commitment which was a certified copy of the judgment, reciting court and cause, and the sentence defining the punishment, and a statement of the offense for which the punishment is inflicted, was a sufficient warrant for holding a petitioner, and was a sufficient judgment.

In California, under a similar statute, the same rule prevails. In the case of *In re Ring*, 28 Cal. 253, the supreme court of that state held that a certified copy of a judgment in the hands of the warden as a commitment, which failed to state the offense for which the prisoner had been convicted, was not sufficient to warrant his detention, but refused to discharge him because it was shown that the judgment entered in the minutes of the court under the requirements of the statute did contain such statement, and could readily be obtained. The supreme court of that state has in later cases followed the rule laid down in the case cited: *Ex parte Raye*, 63 Cal. 492; *Ex parte Williams*, 89 Cal. 421, 26 Pac. 887.

This court has also held a judgment of conviction void in proceedings on habeas corpus, for uncertainty in defining the time for which the defendant was sentenced to prison: *Ex parte Roberts*, 9 Nev. 44, 16 Am. Rep. 1.

It therefore appears from the statute and these decisions that there are two essentials to a valid judgment of conviction, and a process of commitment issued thereon, namely, the statement defining the punishment, and the statement of the offense for which the punishment is inflicted.

We are unable to see why a judgment or commitment **351** should be held insufficient for the omission of one essential, and sufficient in case of the omission of the other.

Are the recitals of the commitment, showing a judgment of a court having jurisdiction of the offense charged and of the person of the petitioner, conclusive of the legality of the imprisonment, and can it not be attacked or impeached on habeas corpus? By section 15 of the act regulating proceedings on habeas corpus (Gen. Stats. 3685), it is provided that the party brought before the judge on the return of the writ may deny or controvert any of the material facts or matters set forth in the return, or except to the sufficiency of the same, or allege any fact to show that either his imprisonment or detention is unlawful, or that he is entitled to his discharge. But this claim of conclusiveness is based upon a subsequent section of the same act (Gen. Stats. 3689), providing that it shall be the duty of the judge, if the time during which the party may legally be detained in custody has not expired, to remand such party, if it shall appear that he is detained in custody by virtue of the final judgment or decree of any competent court of criminal jurisdiction, or of any process issued upon such judgment or decree, or in cases of contempt of court. This section does not prescribe the method by which such fact shall be made to appear, and we must conclude that such showing was intended to be made according to the usual method of procedure in civil actions; that is, by the record of the case. Construing this section with section 15, *supra*, and with the immediately succeeding section, we think it was clearly intended that the jurisdiction of the court should be a matter to be properly inquired into on habeas corpus.

This not only appears to be the rule of our statute, but we believe it is the rule generally, and is sustained by a large number of well-considered cases of the courts of other states, and of the supreme court of the United States.

"The jurisdiction of a court or judge to render a particular judgment or sentence by which a person is imprisoned is always a proper subject of inquiry on habeas corpus": 9 Ency. of Pl. & Pr. 1060.

In one case the supreme court of the state of New York **352** passing upon the precise question raised here, namely, the con-

clusiveness of the showing made in the commitment by the return of the warden, held that the petitioner could impeach the recitals in the commitment, basing this conclusion upon the just and logical reason that, it being the office of the writ to ascertain whether the prisoner is unlawfully imprisoned, there would otherwise be no method of showing the want or excess of jurisdiction in the court rendering the judgment: *In re Divine*, 21 How. Pr. 80.

In a later case the court of appeals of the same state exhaustively discusses and reviews the principle involved, and concludes: "If the process is valid on its face, it will be deemed *prima facie* legal, and the prisoner must assume the burden of impeaching its validity by showing a want of jurisdiction. Error, irregularity, or want of form is no objection, nor is any defect which may be amended or remedied by the court from which it issued. If there was no legal power to render the judgment or decree or issue the process, there was no competent court, and consequently no judgment or process. All is *coram non iudice* and void": *People v. Liscomb*, 60 N. Y. 571, 19 Am. Rep. 211.

A very full discussion of the doctrine will also be found in *Ex parte Lange*, 18 Wall. 163. The supreme court of California has practically held to the same effect. The same doctrine is held to be the law by this court in *Ex parte Winston*, 9 Nev. 74. We must, therefore, conclude that, while the court on habeas corpus has no power to inquire into mere irregularities or errors growing out of methods of procedure which are properly reviewable on appeal, yet, under a proper case, it will in such proceedings inquire into the jurisdiction of the court rendering the particular judgment, to ascertain whether such judgment is void for want or excess of jurisdiction, and to ascertain, in like manner, whether the process issued upon such judgment under which the petitioner is held is also void.

The petitioner was indicted for the crime of murder, alleged to have been committed in the perpetration of the crime of rape. He was tried for the crime of murder. The jury returned a verdict which in direct terms convicts him of the crime of rape. The court sentenced him to twenty ³⁵³ years' imprisonment for the commission of the crime of which he had been convicted.

Murder is defined by our statute (Gen. Stats. 4579) as the unlawful killing of a human being with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned.

By section 17 of the act (Gen. Stats. 4581) it is provided,

among other matters, that all murder which shall be perpetrated by means of poison or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, or burglary, shall be deemed murder in the first degree, and shall be punished by the death of the person committing. By section 412 of the Criminal Procedure (Gen. Stats. 4292) it is provided that in all cases the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the crime charged. We presume the judgment of the court, imprisoning the petitioner, was based upon this section of the statute.

It is hardly necessary to discuss the question as to whether or not the crime of rape is necessarily included in the crime of murder. Murder is a distinct class of offense under our law. It is a generic offense. Rape is of another class. It also is a generic offense.

The legislature, in passing the act making all murder which shall be committed in the perpetration of arson, rape, etc., murder in the first degree, did not create a new crime, but merely made a distinction with a view of different degrees of punishment, based upon different grades of crime.

It was not necessary at common law to even charge that murder was committed in the perpetration of another crime, and it was sufficient to charge it in the common form; and, upon proof that the crime was committed in the perpetration of another crime, such proof stood in lieu of the proof of malice aforethought. This doctrine is sustained by ample authority of the courts of other states under statutes similar to ours.

³⁵⁴ In *State v. Meyers*, 99 Mo. 113, 12 S. W. 516, it is said by the court: "The perpetration or the attempt to perpetrate any of the felonies mentioned in the statute during which attempt, etc., the homicide is committed, stands in lieu of, and is the legal equivalent of, that premeditation, deliberation, etc., which otherwise are necessary attributes of murder in the first degree." To the same effect are the following authorities: *People v. Giblyn*, 115 N. Y. 197, 21 N. E. 1062; *State v. Johnson*, 72 Iowa, 400, 34 N. W. 177; *Titus v. State*, 49 N. J. L. 36, 7 Atl. 621; *Commonwealth v. Flanagan*, 7 Watts & S. 418.

It is conceded that the court had jurisdiction of the person

of the petitioner, and jurisdiction of the subject matter, namely, the crime of murder, of which he was charged. It is also conceded that the court had jurisdiction to try and punish a person charged with rape. But can we hold, under the showing made by the record, that the court had jurisdiction to render the judgment of imprisonment in this particular case?

It is not sufficient to say that as the court has jurisdiction of the person, and jurisdiction to try, convict, and punish for certain crimes, it necessarily has the jurisdiction over the subject matter in a particular case.

The exercise of jurisdiction in this and all cases of felony depends upon certain indispensable conditions and requirements, the absence of which renders the action of the court not merely irregular, erroneous, and voidable, but absolutely void. By section 8, article 1, of the constitution, it is provided, in prohibitive terms, among other matters, that a person shall not be tried for a capital or other infamous crime (except in certain specified cases, of which the case at bar is not one), except on presentment or indictment of a grand jury, and that a person shall not be deprived of his life, liberty, or property without due process of law. Can it even be pretended that the court, in the face of these direct and prohibitive terms of the constitution, could render a valid judgment of imprisonment for an offense of which it has jurisdiction, without presentment or indictment charging the particular offense? Would not the action of the court in such proceeding be utterly void, because of excess of jurisdiction, and because it ³⁵⁵ deprived the party of his liberty without due process of law?

The question involved is not one of irregularity, growing out of rules of procedure, but is one of substantive law, based upon the direct terms of a constitutional guaranty. It is claimed that the record shows that the prisoner was indicted, tried, convicted, and sentenced for the crime of murder. By supplying presumptive facts, this contention is probably correct; but the proven facts of the record contradict and impeach these presumptions, and show conclusively that the petitioner was convicted of the crime of rape—a crime for which he was neither indicted nor tried, and of which he could not have been convicted under the charge contained in the indictment.

Finally, we conclude that in a proceeding on habeas corpus, where it is shown by the return that the petitioner is detained by virtue of a process issued upon a judgment of a competent court of criminal jurisdiction, such showing is *prima facie* only of the fact, and may be attacked or impeached by the record of

the action, for the purpose of showing such excess or want of jurisdiction of the court or officer rendering or issuing the same as to make its action absolutely void, and that where the record shows such excess of jurisdiction, or such want of jurisdiction, as to render the judgment or process void, the petitioner, under such showing, is entitled to his discharge.

Believing the judgment in this case to be void because the court had no jurisdiction of the subject matter—that is, of the crime for which he was convicted—for the reason that the defendant was neither indicted nor tried for the crime of rape, and that the execution of the judgment deprives the petitioner of his liberty without due process of law, the commitment issued on said judgment does not justify his further detention, and he will accordingly be discharged.

HABEAS CORPUS.—THE JURISDICTION of the tribunal whose judgment is involved may be inquired into at all times on habeas corpus: *State v. Kinmore*, 54 Minn. 135, 40 Am. St. Rep. 205, 55 N. W. 830. See, also, *Ex parte Tinsley*, 37 Tex. Cr. Rep. 517, 66 Am. St. Rep. 818, 40 S. W. 306.

HABEAS CORPUS.—MERE ERRORS AND IRREGULARITIES in court proceedings are not reviewable on habeas corpus: In *re Black*, 52 Kan. 64, 39 Am. St. Rep. 331, 34 Pac. 414; In *re Fanton*, 55 Neb. 703, 70 Am. St. Rep. 418, 76 N. W. 447. The writ cannot have the force and operation of a writ of error or certiorari, or appeal, nor is it designed as a substitute for either: *State v. Kinmore*, 54 Minn. 135, 40 Am. St. Rep. 305, 55 N. W. 830.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

FELT v. FELT.

[59 N. J. Eq. 606, 45 Atl. 105, 49 Atl. 1071.]

DIVORCE—DECREE OF AGAINST NONRESIDENT—WHEN CONCLUSIVE.—A decree of divorce, where the jurisdiction rests solely on the domicile of the complainant, and the defendant, being a nonresident, is brought into court by publication and the service of notice outside of the jurisdiction, is conclusive against such nonresident in the courts of other states, including that of which she was a resident when the suit against her was instituted, and the publication made and notice served.

Frank L. Holt, for the appellant.

Washington B. Williams, for the respondent.

607 **GUMMERE, J.** The appellant, by her bill in this case, seeks a decree of divorce from her husband for adultery and also for desertion. The respondent has pleaded, in bar of the relief sought, a decree of absolute divorce obtained by him against the appellant in a district court of the territory of Utah. A full recital of the averments of the plea is not necessary. It is sufficient for present purposes to say that the truth of those averments is conceded by the appellant; that from them it appears that the court which rendered the decree pleaded had jurisdiction of the subject matter of the suit and of the respondent here, who was the complainant therein, and who, at the time of the institution of the suit, was a bona fide resident of the territory of Utah; that the domicile of his wife was in this state and that she was neither served with process within the territory of Utah nor did she personally submit herself to the jurisdiction of the court, but that jurisdiction was

obtained by publication of the process and complaint, made in accordance with the statutes of Utah; that, in addition, personal service thereof was made upon ⁶⁰⁸ her, at her residence in New Jersey, a sufficiently long time before the period within which to make answer had expired, to afford her an opportunity to defend the suit if she had desired to do so, and that the decree was granted upon two grounds, viz., cruelty and desertion.

What force and effect will be attributed to a decree of divorce rendered in a court of a sister state, where the jurisdiction of the court rests solely upon the domicile of the complainant, and where the defendant, being a nonresident, is brought into court by publication and the service of notice outside the jurisdiction, is a question of first impression in this court. It will not be denied that the preservation of good morals and a proper regard for social relations make it desirable that such a decree should be considered valid not only in the state where it is pronounced but in every other jurisdiction, provided the grounds upon which it is based are recognized in such jurisdiction as justifying the decree. By it the matrimonial relation of the husband and wife is terminated in the state in which it is rendered. Within the boundaries of that state a marriage afterward contracted by either of the parties with a third person is entirely valid. So, too, sexual relations between the former husband and wife within that jurisdiction subsequent to the entry of the decree are illicit unless sanctioned by a new marriage. But if the decree is without extraterritorial force, the entire status of both parties is reversed as soon as they pass beyond the limits of that state. A subsequent marriage to a third person within that state then becomes void, and the relations of the parties to it become adulterous, while sexual relations between the parties to the decree, which are meretricious if indulged in within that state, become matrimonial again when indulged in without its borders. A condition of the law which makes the intercourse of a man and woman either legitimate or adulterous as they happen to be within the limits of one state or another is not to be tolerated any further than is plainly required by public policy.

That the public policy of New Jersey does not require that recognition should be refused to a decree of divorce, rendered ⁶⁰⁹ by a court of a sister state, because the defendant had her domicile in another state and was not within the jurisdiction of that court, seems to me plain. State policy, when determined by the legislative, controls the judicial branch of the government; and the legislature of New Jersey, by vesting in our court

of chancery sole jurisdiction over the subject of divorce, and then authorizing it to render decrees divorcing, a vinculo, resident complainants from nonresident defendants after obtaining jurisdiction over the latter by publication, and notice served out of the state upon, or mailed to the postoffice address of, the latter, has, as it seems to me, declared what our policy in this regard shall be. That it was intended by the legislature that decrees of divorce so rendered should be valid in every jurisdiction, so far as it had the power to make them so, goes without saying; and it cannot be conceived that it was intended that we should refuse to accord to the decrees rendered in the courts of our sister states against nonresident defendants who have not submitted themselves to the jurisdiction of such courts, the efficacy we claim for our own when liable to the same objection.

As has been heretofore stated, the question before us has never been determined in this court. It, however, received consideration in *Doughty v. Doughty*, 28 N. J. Eq. 581, although the case was decided upon another ground. In that case, Chief Justice Beasley, delivering the opinion of the court, says: "A judgment of divorce, resting even on such a contracted foundation as the domicile of one of the parties alone, bears with it, into other jurisdictions, a title to respect, and, in some cases, a claim to voluntary adoption. In such instances, I regard the question whether the judgment shall be extraterritorially enforced to be one resting entirely on the consideration that, in a matter of unusual interest of this nature, an obligation rests upon every government to carry into effect as far as is reasonably practicable, and as may be consistent with its own policy, all foreign judgments. But an appeal of this kind to interstate comity should, I think, never prevail when the judgment sought to be accredited has been rendered in violation of that fundamental axiom of justice that the parties, before their rights are adjudged, ⁶¹⁰ shall have an opportunity of being heard. A judgment of divorce proceeding from a jurisdiction founded on domicile would not contravene essential rules of natural justice if actual notice to appear had been served on the defendant residing abroad. It is true that a notice so served on a litigant out of the jurisdiction in which a suit is pending may add nothing to the judicial right to take cognizance over the cause, but, nevertheless, it may impart a quality to the resulting judgment that will serve as a credential to it in a foreign jurisdiction."

There is much contrariety of opinion upon the question in the courts of the various states, but the weight of authority seems to support the view expressed in *Doughty v. Doughty*, 28

N. J. Eq. 581, to this extent at least, that interstate comity requires that a decree of divorce pronounced by a court of the state in which the complainant is domiciled, and which has jurisdiction of the subject matter of the suit, shall, in the absence of fraud, be given full force and effect within the jurisdiction of a sister state, notwithstanding that the defendant does not reside within the jurisdiction of the court which pronounced the decree, and has not been served with process therein; provided, that a substituted service has been made in accordance with the provisions of the statute of that state, and that actual notice of the pendency of the suit has been given to the defendant and a reasonable opportunity afforded to put in a defense thereto; and provided, further, that the ground upon which the decree rests is one which the public policy of the state in which it is sought to be enforced recognizes as a sufficient cause for divorce.

That view commends itself to us, and we think that, subject to the limitations mentioned, the courts of New Jersey should, as a matter of interstate comity, recognize as valid a decree of divorce rendered by the court of a sister state against a resident of this state who has not been served with process.

In the case before us the court pronouncing the decree which has been pleaded in bar of the relief sought by the complainant was a court of the domicile of the present defendant. It had jurisdiction of the subject matter of the suit. There was a substituted service of process upon the defendant therein (the ⁶¹¹ present complainant) by publication, in accordance with the provisions of the Utah statute. Actual notice of the pendency of the suit was given to her in time to have enabled her to make defense thereto if she had desired to do so. There is not even a suggestion that the decree is tainted by fraud, and one of the grounds upon which it rests—namely, desertion—is recognized by the laws of this state as justifying the dissolution of the marriage relation.

The decree appealed from should be affirmed.

CHIEF JUSTICE MAGIE DISSENTED, maintaining that, though a husband, acquiring in good faith a different domicile from that of his wife, might appeal to the courts of his domicile, and obtain such relief as its laws afforded, yet that such relief did not properly operate upon the marital contract and status in respect to either the state of the wife's domicile or the wife herself, and that "if a divorce proceeding bears in any case a resemblance to a proceeding in rem, the analogy fails when the husband and wife have different domiciles, because the rem is not wholly within the

jurisdiction in which the husband seeks relief, but exists also in the state of the wife's domicile, in which she has a status as a married woman under the protection of the state. As to that, the court of the husband's domicile acquires no jurisdiction, and its adjudication cannot claim any extraterritorial effect within the constitutional provision." In support of his views, the chief justice cited decisions of other states, particularly those of Massachusetts, New York, North Carolina, and Pennsylvania.

Extraterritorial Effect of Decrees of Divorce.

The question arising in the principal case has long been involved in doubt, but this doubt has recently been terminated by a decision of the supreme court of the United States. The members of this court, like those of New Jersey, were not unanimous in their opinions, but the opinion of the majority of the judges in both courts is the same in effect.

There has never been any serious doubt that, where the courts of a state are not resorted to in good faith by the complainant, as where he or she has acquired a temporary domicile therein merely for the purpose of procuring a divorce, any judgment rendered by them against a nonresident defendant not served with process within the state, and who has not appeared and submitted to the jurisdiction of the court, is not entitled to respect in other states. Where a husband who, with his wife, was a resident of New York, went to the state of Pennsylvania, and there obtained a decree of divorce based upon constructive service of process on his wife in New York, the supreme court of the United States said: "Upon this record, therefore, the court of Pennsylvania had no jurisdiction of the husband's suit for divorce, because neither party had a domicile in Pennsylvania, and the decree of divorce was entitled to no faith and credit in New York or in any other state": *Bell v. Bell*, 181 U. S. 175, 21 Sup. Ct. Rep. 551, followed in *Streitwolf v. Streitwolf*, 181 U. S. 181, 21 Sup. Ct. Rep. 553.

In the case of *Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. Rep. 544, it appeared that the parties were married in New York, the wife being previously a resident of that state, and the husband of Louisville, Kentucky. They at once went to the latter city and there resided for three years, when, owing to his cruelty and abusive treatment, she left him and returned to her mother in New York, and ever afterward continued a resident of that state, and it was understood between her and her husband that she would permanently reside in New York and not in the state of Kentucky. He, after her return to New York, prosecuted a suit for divorce against her in the state of Kentucky, upon the ground of abandonment. In this suit, pursuant to the requirements of the statute of Kentucky, the clerk of the court made an order warning the defendant to appear within sixty days and answer the petition, and appointing an attorney of the court to defend for her and in her

behalf, and to inform her of the nature and pendency of the suit. This attorney reported to the court that on a day named he wrote to the defendant at the place of her residence in the state of New York, fully advising her of the objects and purposes of the action, and giving her substantially a copy of the petition, and that he directed his letter to her at her place of residence with the postage prepaid, and also with the direction printed on the envelope that, if not delivered, it should be returned to such attorney at his address in Louisville, that the letter had not been returned, and that the attorney had received no response from the defendant, or from anyone for her. When the wife brought a suit in New York for divorce, the husband pleaded in bar thereof the decree granted to him by the court in Kentucky, but this plea was overruled on the ground that the decree in his favor was not entitled to credit in the courts of New York: See *Atherton v. Atherton*, 155 N. Y. 129, 63 Am. St. Rep. 650, 49 N. E. 933. He then prosecuted a writ of error to the supreme court of the United States, which reversed the judgment of the courts of New York. The opinion was written by Mr. Justice Gray, and is as follows: "The first section of the fourth article of the constitution of the United States is as follows: 'Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.' This section was intended to give the same conclusive effect to the judgments of all the states, so as to promote certainty and uniformity in the rule among them. And Congress, in the exercise of the power so conferred, besides prescribing the manner in which the records and judicial proceedings of any state may be authenticated, has defined the effect thereof, by enacting that 'the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken': Rev. Stats., sec. 905, re-enacting act of May 26, 1790, c. 11 (1 Stats. 122); *Huntington v. Attrill* (1892), 146 U. S. 657, 684, 13 Sup. Ct. Rep. 224.

"By the general statutes of Kentucky of 1873, chapter 52, article 3, courts of equity may grant a divorce for abandonment by one party of the other for one year; petitions for divorce must be brought in the county where the wife usually resides if she has an actual residence in the state; if not, then in the county of the husband's residence; and shall not be taken for confessed, or be sustained by confessions of the defendant alone, but must be supported by other proofs.

"By the Civil Code of Practice of Kentucky of 1876, title 4, chapter 2, article 2, if a defendant has been absent from the state four months, and the plaintiff files an affidavit stating in what country the defendant resides, or may be found, the clerk may

make an order warning the defendant to defend the action within sixty days, and shall at the same time appoint, as attorney for the defendant, a regular practicing attorney of the court, whose duty it shall be to make diligent efforts to inform the defendant by mail concerning the pendency and nature of the action against him, and to report to the court the result of his efforts; and a defendant against whom a warning order is made, and for whom an attorney is appointed, is deemed to have been constructively summoned on the thirtieth day thereafter, and the action may proceed accordingly.

"In accordance with these statutes, on December 28, 1892, the husband filed in a proper court of Kentucky a petition, under oath, for a divorce from the bond of matrimony, alleging his wife's abandonment of him ever since October, 1891, and that she had been absent from the state for more than four months, and might be found at Clinton, in the state of New York, and that in Clinton was kept the postoffice nearest the place where she might be found; and the clerk entered a warning order, and appointed an attorney at law for the defendant. On January 3, 1893, that attorney wrote to the wife at Clinton, fully advising her of the object of the petition for divorce, and inclosing a copy thereof, in a letter addressed to her by mail at that place, and having printed on the envelope a direction to return it to him, if not delivered within ten days. On February 6, 1893, the attorney, not having received that letter again, or any answer from the defendant, or in her behalf, made his report to the court. And on March 14, 1893, the court, after taking evidence, including an agreement made by the parties in Kentucky, October 10, 1891, as to the domicile, custody, and support of their child, granted to the husband an absolute divorce for his wife's abandonment of him.

"There can be no doubt that this decree was by law and usage entitled to full faith and credit as an absolute decree of divorce in the state of Kentucky. The court of appeals of that state has held that, under its statutes, a wife residing in the state was entitled to obtain a decree of divorce against a husband who had left the state, or who had never been within it; and Chief Justice Robinson said: 'It would be a reproach to our legislation if a faithless husband in Kentucky could, by leaving the state, deprive his abandoned wife of a power of obtaining a divorce at home': *Rhymes v. Rhymes*, 7 Bush, 316; *Perzel v. Perzel*, 91 Ky. 634, 15 S. W. 658. That court has recognized that the regulation of divorce belongs to the legislature of the domicile of the parties: *Maguire v. Maguire*, 7 Dana, 181, 185-187. And the same court, where husband and wife have lived together in Kentucky, and she abandoned him, and he became a bona fide citizen of Indiana, held that a divorce from the bonds of matrimony, obtained by him against the wife in that state, by proceedings on constructive service, and ac-

according to the laws of that state, determined the status of the parties in Kentucky: *Hawkins v. Ragsdale*, 80 Ky. 353, 44 Am. Rep. 483. There is a weight of authority in accord with the views maintained by the court of appeals of Kentucky, although there are some decisions of learned courts to the contrary.

"The purpose and effect of a decree of divorce from the bond of matrimony, by a court of competent jurisdiction, are to change the existing status or domestic relation of husband and wife, and to free them both from the bond. The marriage tie, when thus severed as to one party, ceases to bind either. A husband without a wife, or a wife without a husband, is unknown to the law. When the law provides, in the nature of a penalty, that the guilty party shall not marry again, that party, as well as the other, is still absolutely freed from the bond of the former marriage. The rule as to the notice necessary to give full effect to a decree of divorce is different from that which is required in suits in personam.

"In *Pennoyer v. Neff*, 95 U. S. 714, 734, this court, speaking by Mr. Justice Field, while deciding that a judgment of a state court on a debt could not be supported without personal service on the defendant within the state or his appearance in the cause, took occasion to say: "To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a state may not authorize proceedings to determine the status of one of its citizens toward a nonresident, which would be binding within the state, though made without service of process or personal notice to the nonresident. The jurisdiction which every state possesses to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which the proceedings affecting them may be commenced and carried on within its territory. The state, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties, guilty of acts for which, by the law of the state, a dissolution may be granted, may have removed to a state where no dissolution is permitted. The complaining party would therefore fail if a divorce were sought in the state of the defendant; and if application could not be made to the tribunals of the complainant's domicile in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress: 2 Bishop on Marriage and Divorce, sec. 156."

"In *Cheely v. Clayton*, 110 U. S. 701, 4 Sup. Ct. Rep. 328, which involved the validity of a decree of divorce, obtained in Colorado by a husband domiciled there, against his wife for unjustly refusing to live with him, this court said: "The courts of the state of the domicile of the parties doubtless have jurisdiction to decree

a divorce in accordance with its laws, for any cause allowed by those laws, without regard to the place of the marriage, or to that of the commission of the offense for which the divorce is granted; and a divorce so obtained is valid everywhere: Story on Conflict of Laws, sec. 230a; Cheever v. Wilson, 9 Wall. 108; Harvey v. Farnie, L. R. 8 App. Cas. 43. If a wife is living apart from her husband without sufficient cause, his domicile is in law her domicile, and in the absence of any proof of fraud or misconduct on his part, a divorce obtained by him in the state of his domicile, after reasonable notice to her, either by personal service or by publication in accordance with its laws, is valid, although she never in fact resided in that state: Burlen v. Shannon, 115 Mass. 438; Hunt v. Hunt, 72 N. Y. 218, 28 Am. Rep. 129. But in order to make the divorce valid, either in the state in which it is granted or in another state, there must, unless the defendant appeared in the suit, have been such notice to her as the law of the first state requires: Cheely v. Clayton, 110 U. S. 705, 4 Sup. Ct. Rep. 328. In that case the decree of divorce was held void, because the notice required by the laws of the state had not been given; and the finding of the court below that the wife, at the time of the proceedings for divorce, was a citizen and resident of the state of Illinois, was given no weight, because, as this court said, it was hard to see how, if she unjustifiably refused to live with her husband in Colorado, she could lawfully acquire in his lifetime a separate domicile in another state; or how, if the Colorado court had jurisdiction to render the decree of divorce, and did render it on the ground of her unlawful absence from him, the finding of the court below could consist with the fact so adjudged in the decree of divorce: Cheely v. Clayton, 110 U. S. 709, 4 Sup. Ct. Rep. 328.

"In *Harding v. Alden*, 9 Greenl. 140, 23 Am. Dec. 549, the husband and wife lived together in Maine. He deserted her and took up a residence in North Carolina, and there married and lived with another woman. The first wife then moved to and resided in Providence, Rhode Island, and there filed a libel in the supreme judicial court for an absolute divorce against him for his desertion and adultery; and the court, after service of a citation on him, and two continuances of the cause, decreed a divorce as prayed for. The husband was never an inhabitant of Rhode Island. The wife afterward married another man. The supreme judicial court of Maine, in an opinion delivered by Mr. Justice Weston, held that the divorce in Rhode Island dissolved the marriage bond between the parties, and said: 'If we refuse to give full faith and credit to the decree of the supreme judicial court of Rhode Island, because the party libeled had his domicile in another state, and was not within their jurisdiction, we refuse to accord to the decrees of that court the efficacy we claim for our own, when liable to the same objection. In the case before us it is agreed that the party injured

was at the time an inhabitant of Rhode Island, residing in Providence, and this fact is recited in the decree. It appears that by order of the court a citation was served upon the defendant in person; and that a continuance was twice granted to give him an opportunity to appear in defense. This shows a due regard to that principle of justice which gives to the party accused the right to be heard. The decree was rendered by the highest judicial tribunal in that state. As it belongs to that tribunal to declare, authoritatively and definitely, what the law of the state is, we are bound to infer that by that law the bonds of matrimony previously existing between the libellant and her former husband were thereby dissolved; and that such is the effect of the decree within the state of Rhode Island: *Harding v. Alden*, 9 Greenl. 148, 23 Am. Dec. 549. 'There would be great inconvenience in holding that a divorce decreed in the state where the injured party resided might not be held valid through the Union, where the right of citizenship is common, where the party accused had established his domicile in another state, and there committed adultery. And this is the only objection to the efficacy of the decree in question, it being insisted that the court had no jurisdiction over the absent party. As has been before intimated, it would apply with equal force to many divorces decreed in this state. It would require that the wife, abandoned and dishonored, should seek the new domicile of the guilty husband, *animo manendi*, before she could claim the benefit of the law to be relieved from his control. In giving effect here to the divorce decreed in Rhode Island, we would wish to be understood that the ground upon which we place our decision is limited to the dissolution of the marriage. In the libel, alimony was prayed for, and certain personal property, then in the possession of the wife, was decreed to her. Had the court awarded her a gross sum, or a weekly or an annual allowance, to be paid by the husband, and the courts of this or any other state had been resorted to to enforce it, a different question would be presented': *Harding v. Alden*, 9 Greenl. 151, 23 Am. Dec. 549.

"Chancellor Kent, in his Commentaries, says of that case that it was there held 'that a decree of divorce did not fall within the rule that a judgment rendered against one not within the state, nor bound by its laws, nor amenable to its jurisdiction, was not entitled to credit against the defendant in another state; and that divorces pronounced according to the law of one jurisdiction, and the new relations thereupon formed, ought to be recognized, in the absence of all fraud, as operative and binding everywhere, so far as related to the dissolution of the marriage, though not as to other parts of the decree, such as an order for the payment of money by the husband.' And the chancellor adds: 'This is an important and valuable decision': 2 Kent's Commentaries, 110, note.

"In *Ditson v. Ditson*, 4 R. I. 87 (of which Judge Cooley, in his treatise on Constitutional Limitations, 403, note, says there is no case in the books more full and satisfactory upon the whole subject of jurisdiction in divorce suits), the supreme court of Rhode Island, in an elaborate opinion by Chief Justice Ames, affirmed its jurisdiction, upon constructive notice by publication, to grant a divorce to a wife domiciled in Rhode Island against a husband who had never been in Rhode Island, and whose place of residence was unknown, and said: 'It is obvious that marriage, as a domestic relation, emerged from the contract which created it, is known and recognized as such throughout the world; that it gives rights and imposes duties and restrictions upon the parties to it, affecting their social and moral condition, of the measure of which every civilized state, and certainly every state in this Union, is the sole judge so far as its own citizens or subjects are concerned, and should be so deemed by other civilized, and especially sister, states; that a state cannot be deprived, directly or indirectly, of its sovereign power to regulate the status of its own domiciled subjects and citizens, by the fact that the subjects and citizens of other states, as related to them, are interested in that status; and in such a matter has a right, under the general law, judicially to deal with and modify or dissolve this relation, binding both parties to it by the decree, by virtue of its inherent power over its own citizens and subjects, and to enable it to answer their obligatory demands for justice; and finally, that in the exercise of this judicial power, and in order to the validity of a decree of divorce whether a *mensa et thoro* or a *vinculo matrimonii*, the general law does not deprive a state of its proper jurisdiction over the condition of its own citizens, because nonresidents, foreigners, or domiciled inhabitants of other states have not, or will not, become, and cannot be made to become, personally subject to the jurisdiction of its courts; but upon the most familiar principles, and as illustrated by the most familiar analogies of general law, its courts may and can act conclusively in such a matter upon the rights and interests of such persons, giving to them such notice, actual or constructive, as the nature of the case admits of, and the practice of courts in similar cases sanctions': *Ditson v. Ditson*, 4 R. I. 105, 106.

"The statutes of Massachusetts provided as follows: 'When an inhabitant of the state goes into another state or country to obtain a divorce for any cause occurring here, and whilst the parties resided here, or for any cause which would not authorize a divorce by the laws of this state, a divorce so obtained shall be of no force or effect in this state. In all other cases a divorce decreed in any other state or country according to the laws thereof, by a court having jurisdiction of the cause and both the parties, shall be valid and effectual in this state.' That provision

made no change in the law, but, in the words of the commissioners upon whose advice it was first enacted, 'is founded on the rule established by the comity of all civilized nations, and is proposed merely that no doubt shall arise on a question so interesting and important as this may sometimes be': Gen. Stats. 1860, c. 107, secs. 54, 55; Rev. Stats. 1836, c. 76, secs. 39, 40, and note of commissioners; *Ross v. Ross*, 129 Mass. 243, 248, 37 Am. Rep. 321.

"In *Hood v. Hood*, 11 Allen, 196, 87 Am. Dec. 709, the husband and wife, after living together in Massachusetts, removed to Illinois, and there lived together; the wife, 'under circumstances as to which there was no evidence,' and afterward the husband, came back to Massachusetts, and, while they were living there in his brother in law's house for a few weeks, he signed an agreement, reciting that they had separated, and promising to pay her a certain weekly sum so long as she should remain single. She continued to reside in Massachusetts, and he obtained in Illinois a decree of divorce from her for her desertion, upon such notice as the laws of Illinois authorized in the case of an absent defendant. It was held by the supreme judicial court of Massachusetts, in an opinion delivered by Mr. Justice Hoar, that both parties had their domicile in Illinois, and were subject to the jurisdiction of its courts; and that the fact of desertion by the wife was conclusively settled between the parties by the decree in Illinois, and it was not competent for the wife to contradict it on a libel afterward filed by her in Massachusetts, and her libel was dismissed. And in *Hood v. Hood*, 110 Mass. 463, it appearing that such dismissal was upon the ground of the previous decree of divorce in Illinois, it was adjudged that that decree could not be impeached by the wife in a writ of dower by her against third persons, the court saying: 'The decree in favor of her husband, dismissing her libel, was then forever conclusive against her, as between themselves. It severed the relation between them, or, rather, estopped her from averring anything to the contrary of the decree in Illinois which purported to sever that relation. The general rule, however, in regard to estoppels of record, is that they are good only between the parties of record and their privies. They cannot be set up in collateral proceedings between one of these parties and third persons. But the effect of the judgment in this case was to determine the status of the demandant. So far as it did that, it is a judgment that is operative and conclusive as to all the world.'

"The like view has been affirmed by courts of other states: *Thompson v. State*, 28 Ala. 13; *Leith v. Leith*, 39 N. H. 20; *Shafer v. Bushnell*, 24 Wis. 372; *Gould v. Crow*, 57 Mo. 200; *Van Orsdal v. Van Orsdal*, 67 Iowa, 35, 24 N. W. 579; *Smith v. Smith*, 43 La. Ann. 1140, 10 South. 248; *In re James*, 99 Cal. 374, 37 Am. St. Rep. 60, 33 Pac. 1122; *Dunham v. Dunham*, 162 Ill. 589, 44 N. E. 841.

"In *Shaw v. Shaw*, 98 Mass. 158, the husband and wife, domiciled in Massachusetts, left the state to take up their residence in Colorado. In Pennsylvania, on the journey, he treated her with extreme cruelty, and she left him and returned to Massachusetts, and continued to reside there. It was held that while they were in Pennsylvania the domicile of both parties remained in Massachusetts, and that the wife might maintain a libel in Massachusetts for the cause occurring in Pennsylvania, although the husband before it occurred had left Massachusetts with the intention of never returning, and never did in fact return, and therefore no notice was or could be served upon him in Massachusetts.

"In a very recent case, the court of errors of New Jersey maintained the validity of a divorce obtained in the state of Utah by a husband, having his bona fide domicile there, against a wife whose domicile was in New Jersey, after publication of the process and complaint in accordance with the statutes of Utah, and personal service upon the wife in New Jersey in time to enable her to make defense, if she wished to do so. Mr. Justice Gummere, speaking for the court of errors, said that, at least, 'inter-state comity requires that a decree of divorce, pronounced by a court of the state in which the complainant is domiciled, and which has jurisdiction of the subject matter of the suit, shall, in the absence of fraud, be given full force and effect within the jurisdiction of a sister state, notwithstanding that the defendant does not reside within jurisdiction of the court which pronounced the decree, and has not been served with process therein; provided, that a substituted service has been made in accordance with the provisions of the statutes of that state, and that actual notice of the pendency of the suit has been given to the defendant, and a reasonable opportunity afforded to put in a defense thereto; and provided, further, that the ground upon which the decree rests is one which the public policy of the state in which it is sought to be enforced recognizes as a sufficient cause for divorce': *Felt v. Felt*, 59 N. J. Eq. 606, ante, p. 612, 45 Atl. 105 49 Atl. 1071.

"In New York, North Carolina, and South Carolina the opposite view has prevailed, either upon the ground that the rule as to notice is the same in suits for divorce as in ordinary suits in personam, or upon the ground that, in the absence of actual notice or appearance, the decree, while it may release the libellant, cannot release the libelee from the bond of matrimony: *People v. Baker*, 76 N. Y. 78, 32 Am. Rep. 274; *O'Dea v. O'Dea*, 101 N. Y. 23, 4 N. E. 110; *In re Kimball*, 155 N. Y. 62, 49 N. E. 331; *Irby v. Wilson*, 1 Dev. & B. Eq. 568; *McCreery v. Davis*, 44 S. C. 195, 51 Am. St. Rep. 794, 22 S. E. 178.

"In *People v. Baker*, 76 N. Y. 78, 32 Am. Rep. 274, upon which the subsequent decisions in New York are based, the defendant was married to a woman in the state of Ohio; they afterward

lived together in the state of New York; the wife, upon notice by publication, and without personal appearance by the husband, he being in New York, obtained a decree of divorce against him in Ohio; and he afterward married another woman in New York, and was convicted of bigamy there. The conviction was affirmed by the court of appeals, without a suggestion that the first wife was not domiciled in Ohio at the time of the divorce, but stating the question in the case to be: 'Can a court, in another state, adjudge to be dissolved and at an end the matrimonial relation of a citizen of this state, domiciled and actually abiding here throughout the pendency of the prejudicial proceedings there, without a voluntary appearance by him therein, and with no actual notice to him thereof, and without personal service of process on him in that state?' The court admitted that 'if one party to a proceeding is domiciled in a state, the status of that party, as affected by the matrimonial relation, may be adjudged upon and confirmed or changed, in accordance with the laws of that state'; but held that, without personal appearance or actual notice, the decree could not affect the matrimonial relation of the defendant in another state. The court recognized that the law was settled otherwise in some states, and said: 'It remains for the supreme court of the United States, as the final arbiter, to determine how far a judgment rendered in such a case, upon such substituted service of process, shall be operative without the territorial jurisdiction of the tribunal giving it.'

"The authorities cited above show the wide diversity of opinion existing upon this most important subject, and admonish us to confine our decision to the exact case before us.

"This case does not involve the validity of a divorce granted, on constructive process, by the court of a state in which only one of the parties ever had a domicile; nor the question to what extent the good faith of the domicile may be afterward inquired into. In this case, the divorce in Kentucky was by the court of the state which had always been the undoubted domicile of the husband, and which was the only matrimonial domicile of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been given as was required by the statutes of Kentucky.

"The husband always had his domicile in Kentucky, and the matrimonial domicile of the parties was in Kentucky. On December 28, 1892, the husband filed his petition for a divorce in the court of appropriate jurisdiction in Kentucky, alleging an abandonment of him by the wife in Kentucky, and a continuation of that abandonment for a year, which was the cause of divorce by the laws of Kentucky. His petition truly stated, upon oath, as required by the statutes of Kentucky, that the wife might be found at Clinton, in the state of New York, and that at Clinton was the

postoffice nearest the place where she might be found. As required by the statutes of Kentucky, the clerk thereupon entered a warning order to the wife to appear in sixty days, and appointed an attorney at law to represent her. The attorney, on January 5, 1893, wrote to the wife at Clinton, fully advising her of the object of the petition for divorce, and inclosing a copy thereof, in a letter addressed to her by mail at Clinton, and having printed on the envelope a direction to return it to him if not delivered in ten days. There is a presumption of fact, though not of law, that a letter put in the postoffice and properly addressed is received by the person to whom it is addressed: *Rosenthal v. Walker*, 111 U. S. 185, 4 Sup. Ct. Rep. 382. On February 6, 1893, the attorney, having received no answer, made his report to the court. And on March 14, 1893, the court, after taking evidence, granted the husband an absolute decree of divorce for his wife's abandonment of him.

"The court of New York has indeed found that the wife 'was not personally served with process within the state of Kentucky, or at all.' It may be doubted whether this negatives her having received, or had knowledge of, the letter sent to her by the attorney in Kentucky, January 5, 1893, six days before she began her suit in New York. But assuming that it does, the question in this case is not whether she had actual notice of the proceedings for divorce, but whether such reasonable steps had been taken to give her notice as to bind her by the decree in the state of the domicile.

"The court in New York found that the wife left the husband and went to Clinton with the purpose and intention of not returning to the state of Kentucky, but of permanently residing in the state of New York; and that this purpose and intention were understood by the husband at the time, and were contemplated and evidenced by the agreement executed by the parties in Kentucky, October 10, 1891. But that agreement was among the proofs submitted to the court in Kentucky, and may well have been considered by that court, as the preamble to the agreement states, as simply intended to provide for the interest of their child, recognizing that the parties had ceased to live together as husband and wife, but 'without in any way acknowledging upon whom is the fault, or condoning the conduct of the one or the other which has led to the existing state of affairs, or preventing any consequence which may follow, or right which may arise to either party if such status shall continue.' The agreement contains no mention of the domicile of either husband or wife, but declares that the domicile of the child is to be the state of Kentucky, and is taken up with providing that its custody shall be half of each year with the mother, and the other half with the paternal grandmother, and with providing for the support and custody of the

child, in various future contingencies, including the divorce and second marriage of the husband or of the wife.

"We are of opinion that the undisputed facts show that such efforts were required by the statutes of Kentucky, and were actually made, to give the wife actual notice of the suit in Kentucky, as to make the decree of the court there, granting a divorce upon the ground that she had abandoned her husband, as binding on her as if she had been served with notice in Kentucky, or had voluntarily appeared in the suit. Binding her to that full extent, it established, beyond contradiction, that she had abandoned her husband, and precludes her from asserting that she left him on account of his cruel treatment.

"To hold otherwise would make it difficult, if not impossible, for the husband to obtain a divorce for the cause alleged, if it actually existed. The wife not being within the state of Kentucky, if constructive notice, with all the precautions prescribed by the statutes of that state, were insufficient to bind her by a decree dissolving the bond of matrimony, the husband could only get a divorce by suing in the state in which she was found; and by the very fact of suing her there he would admit that she had acquired a separate domicile (which he denied), and would disprove his own ground of action that she had abandoned him in Kentucky.

"The result is that the courts of New York have not given the Kentucky decree the faith and credit which it had by law in Kentucky, and, therefore, their judgments must be reversed, and the case remanded to the supreme court of New York for further proceedings not inconsistent with this opinion."

Mr. Justice Peckham, with whom the chief justice concurred, dissenting, said: "I think this case was rightly decided by the court of appeals of New York, and I therefore dissent from the judgment and opinion of the court herein.

"I think if the husband had, at his domicile in Kentucky, been guilty of such misconduct and cruelty toward his wife as entitled her to a divorce, she had a legal right for that reason to leave him and to acquire a separate domicile, even in another state. If, under such circumstances, she did leave him, and did acquire a separate domicile in New York state, the Kentucky court did not obtain jurisdiction over her as an absent defendant, by publication of process or sending a copy thereof through the mail to her address in New York.

"It has long been held that the wife upon such facts could acquire a separate domicile. In *Cheever v. Wilson*, 9 Wall. 108, 123, 124, it was so decided, and the case of *Ditson v. Ditson*, 4 R. I. 87, was therein cited with approval upon that proposition. It was said in the Rhode Island case that 'although as a general doctrine, the domicile of the husband is by law that of the wife, yet when he commits an offense, or is guilty of such dereliction

of duty in the relation as entitled her to have the marriage either partially or totally dissolved, she not only may, but must, to avoid condonation, establish a separate domicile of her own. This she may establish—nay, when deserted, or compelled to leave her husband, necessity frequently compels her to establish it—in a different judicial or state jurisdiction than that of her husband, according to the residence of her family or friends. Under such circumstances she gains, and is entitled to gain, for the purposes of jurisdiction, a domicile of her own.' This is also held in *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129, where many of the authorities are collected.

"By the statute of New York in force at the time the parties were therein married the court had jurisdiction to grant a limited divorce on the complaint of a married woman, where the marriage had been solemnized in the state and the wife was an actual resident therein at the time of exhibiting her complaint. By virtue of this statute and of the wife's residence in New York at the time of exhibiting her complaint (if such residence were legally acquired, as already stated), the court in that state had jurisdiction of an action for divorce against her husband, and jurisdiction over the husband was complete when he appeared in the suit. Having the right to acquire a residence in the state, it was open to her to prove in the divorce case which she instituted in New York the facts which justified her leaving her husband's home in Kentucky, and in acquiring a separate domicile in New York, and the decision of the Kentucky court that it had jurisdiction over her in her husband's suit was not conclusive against her upon that question. The New York court entered upon the inquiry and found the fact that she was justified by her husband's acts in leaving his home and in acquiring a new domicile for herself, and that the Kentucky court, therefore, obtained no jurisdiction over her. It also found the facts necessary to warrant it in granting to her a divorce under the laws of New York, and it granted one accordingly. This, I think, the New York court had jurisdiction to do, and it did not thereby refuse the constitutional full faith to the Kentucky judgment.

"That a husband can drive his wife from his home by conduct which entitles her to a divorce, and thus force her to find another domicile, and then commence proceedings in a court of his own domicile for a divorce, which court obtains jurisdiction over her only by a service of process in the state of her new domicile, through the mail, and that on such service he can obtain a judgment of divorce which shall be conclusive against her in her action in the court of her own domicile, seems to me to be at war with sound principle and the adjudged cases. The doctrine of status, even as announced in the opinion of the court, does not reach the case of a husband by his misconduct rendering it necessary for the wife to leave him. I therefore dissent."

**SAYRE v. MAYOR AND COMMON COUNCIL OF
NEWARK.**

[60 N. J. Eq. 361, 45 Atl. 985.]

MUNICIPAL CORPORATIONS.—THE RIGHT TO CONSTRUCT SEWERS DRAINING INTO AN ADJOINING NAVIGABLE, TIDAL STREAM is conferred on a municipal corporation by statutes empowering it to pass all such ordinances as its common council shall deem necessary for the purpose of regulating the streets and causing sewers and drains to be made in any part of the city, and to take property and use all such lands, waters, and streams within and adjacent to the city as may be necessary to drain and carry off the water from the streets, lanes, alleys, and grounds of the city.

MUNICIPAL CORPORATIONS—RIGHT TO USE NAVIGABLE, TIDAL STREAMS FOR SEWERAGE PURPOSES.—The legislature has the right to authorize a municipality of the state to use tidal, navigable streams within its borders for sewerage purposes, though such use causes some defilement. The degree of pollution to be permitted is a matter over which the legislature has full control.

PUBLIC, TIDAL WATERS—POLLUTION OF BY A MUNICIPAL CORPORATION—LAND OWNER'S RIGHTS.—One whose lands front upon public, navigable, tidal waters cannot enjoin the pollution of such waters by the sewers of a municipal corporation if its acts are authorized by statute, for if a corporation, whether public or private, in the reasonable exercise of a franchise granted to it for public purposes, causes incidental damage to private property, such damage is *damnum absque injuria*.

Suit to restrain the defendants from building a sewer by which the city of Newark proposed to discharge into the Passaic river at a point fifty-five feet north from the property of the complainants, each twenty-four hours, upward of two million gallons of house sewage. The complainants' property fronted two hundred feet on the river and extended back two hundred and thirty-seven feet therefrom. Vice-chancellor Reid ordered a decree as prayed for by the complainants, and the defendants appealed.

Joseph Coult, for the appellants.

Thomas N. McCarter, Jr., and Robert H. McCarter, for the respondents.

363 DIXON, J. The complainant, Marcus Sayre, is the owner, and The Marcus Sayre Company is the lessee, of land having a frontage of about two hundred feet on the west side of the Passaic river, in the city of Newark, where they carry on the business of buying and selling mason's materials. At that point,

and for several miles above the city, the tide ebbs and flows in the river, and the river is navigable for vessels of considerable size. Consequently, the state was the owner of the bed of the river below ordinary high-water mark; but in pursuance of an implied license from the state growing out of the local common law of New Jersey, as declared in *Bell v. Gough*, 23 N. J. L. 624, and *Stevens v. Paterson etc. R. R. Co.*, 34 N. J. L. 532, 3 Am. Rep. 269, the complainant owning the upland had built a dock in front thereof, and thus had acquired title to so much of the shore as was occupied by the dock.

The object of the bill of complaint is to restrain the city of Newark from completing and using a public sewer now in process of construction and designed to empty its contents into the Passaic river below low-water mark, and about fifty-six feet north of the complainants' property. The ground of objection is that the sewage discharged from the sewer will be carried by the tide to the complainants' property, and will so infect the water and air in the neighborhood as to impair the comfort and health of persons engaged on the premises and thus lessen the value of the property.

The sewer in question is designed to be an auxiliary in the city's plan of sewerage. Experience has shown that in times of ³⁶⁴ heavy rain the existing sewers are inadequate to carry off the water and sewage that seek passage through them, and hence the filthy material is backed up into the streets and cellars of connected buildings. The object of the new sewer is mainly to receive this surplus and conduct it to the river, and the evidence in the cause shows that the city authorities have exercised their discretion in planning the sewer and are constructing it with care for the accomplishment of that purpose.

We are thus brought to the controlling questions in the case: 1. Whether the legislature has intended to authorize the city to construct and use such a sewer; 2. Whether the legislature has constitutional power to grant such authority; and 3. Whether the complainants, as private owners of property likely to sustain some incidental damage from the operation of the sewer, are entitled to have the city restrained from exercising the authority conferred.

As to the first question, by the original charter of Newark as a city, passed February 29, 1836 (Pub. Laws 1836, p. 185), the common council was empowered to pass all such ordinances as they should deem proper for regulating the streets and causing common sewers and drains to be made in any part of the city. By a supplement to the charter passed February 28, 1838

(Pub. Laws 1838, p. 218), "the mayor and common council of the city, to enable them more fully, effectually, and completely to exercise the powers already conferred on them of passing all such ordinances as they shall think proper, and of raising and borrowing money for causing common sewers and drains to be made in any part of the city," were authorized and empowered to take and appropriate to the use of the city all such lands, waters, and streams within and adjacent to the said city as might be suitable or necessary to drain and carry off the water from the streets, lanes, alleys, and grounds in the city. This act makes provision for compensation to the owners of property taken.

By another supplement approved February 28, 1849 (Pub. Laws 1849, p. 203), the city was empowered to cause the expense of building sewers to be assessed, in whole or in part, on the owners of property benefited. This plainly contemplates the ³⁶⁵ construction of common sewers for the benefit of private property.

By an act to revise and amend the charter of the city, approved March 11, 1857 (Pub. Laws 1857, p. 116), these provisions were re-enacted so far as they relate to the regulation of streets, the construction of sewers, and the assessment of the expense thereof on property benefited; and nothing therein contained was to impair or take away any right acquired or given by any former act. This statute also expressly empowered the council to provide for the protection and maintenance of the health of the city.

By a supplement to this act, approved March 19, 1857 (Pub. Laws 1857, p. 301), the authority of the city to construct the sewer in the first and second wards of the city, commonly known as the "north sewer," is distinctly asserted by the legislature. This sewer was built to drain private property as well as streets, and empties into the Passaic river.

A further supplement approved March 26, 1872 (Pub. Laws 1872, p. 828), expressly recognizes the authority of the city to construct sewers in the public streets for the draining of private property lying along the streets.

The evidence in this case shows that at least as early as 1854 the municipality constructed common sewers through the streets, having their final outlet in the Passaic river, to carry off, not only the water and refuse in the streets, but also the sewage from private property; and from that time to the present this power has been continually exercised.

In *Stoudinger v. Newark* (1877), 28 N. J. Eq. 187, a bill was filed to prevent the city from constructing what is known as the Mill brook sewer, which ran from High street through various streets to the Passaic river, and was intended to conduct into the river the foul waters of the Mill brook, and the sewage of the streets and houses along its course. But Vice-chancellor Van Fleet decided that the city had power to build the sewer, and held that the location of sewers, their size and capacity, and the materials of which they should be constructed, were matters which, by the charter, were committed to the judgment of the municipal authorities, and so long as they kept within ³⁶⁶ their power and did not abuse it, their acts were not subject to judicial revision. The order of the court of chancery denying an injunction was affirmed by this court (*Stoudinger v. Newark*, 28 N. J. Eq. 446), with a declaration that it was not only the right, but the duty, of the municipal authorities to erect and maintain all necessary sewers.

In view of this course of public conduct on the part of the city, of this series of legislative enactments, and of these judicial utterances, we are impelled to the conclusion that the legislature has intended to confer upon the city of Newark the right to use the Passaic river as an outlet for such sewers as the municipal authorities deem necessary for removing the surplus water and sewage of the city and its inhabitants.

The next question is whether the legislature has the constitutional power to confer such a right.

In *Stevens v. Paterson etc. R. R. Co.*, 34 N. J. L. 532, 3 Am. Rep. 269, Chief Justice Beasley, expressing the opinion of this court that the legislature had the power to grant lands in a navigable river below high-water mark, without regard to the owner of the adjacent upland, declared "that all navigable waters within the territorial limits of the state, and the soil under such waters, belong in actual propriety to the public; that the riparian owner, by the common law, has no peculiar rights in this public domain, as incidents of his estate; . . . that, as a general rule, the public domain is subject altogether to the control of the legislature; . . . that, unless in certain particulars protected by the federal constitution, the public rights in navigable rivers can, to any extent, be modified or absolutely destroyed by statute; . . . that the dominion of the legislature over the *jura publica* appears to be unlimited. By this power they can be regulated, abridged, or vacated."

These explicit declarations of the judgment of this court seem to place beyond question the power of the legislature to

authorize the municipalities of the state to use the tidal navigable streams within our borders for sewerage purposes. The federal constitution interposes no obstacle to the exercise of such a power, provided the availability of the stream for interstate and foreign commerce be not impaired; and as no private ³⁶⁷ property exists in such waters, there remain only the *jura publica*, over which, in the words of the chief justice, the dominion of the legislature appears to be unlimited. Indeed the history of sewers shows that from time immemorial the right to connect them with navigable streams has been regarded as part of the *jus publicum*. Although in England, until modern times, sewers were used chiefly to drain low lands liable to be submerged by tide and rain and the streets of towns, yet in other countries for centuries past, and more recently in England and the United States, they have been constructed to carry off the sewage of dwellings; and whenever tidal streams could conveniently be reached, they have been employed as the medium of discharge to the sea. Such a use of public waters must necessarily entail some defilement; the degree of pollution to be permitted is a matter over which the legislature has full power of control.

It therefore seems clear that in New Jersey the legislature may constitutionally confer on the municipalities of the state the right to use tidal streams for sewerage purposes, and that in the proposed construction and operation of the sewer now in question the city of Newark is within the limits of its delegated authority.

The last point for consideration is whether the complainants may restrain the exercise of this authority, because of the incidental damage which it will cause to them and their property.

The principle laid down by the supreme court in *Beseman v. Pennsylvania R. R. Co.*, 50 N. J. L. 235, 13 Atl. 164, and approved by this court in 52 N. J. L. 221, 20 Atl. 169, disposes of this phase of the controversy. That principle is, that, if a corporation, though private, in the reasonable exercise of a franchise lawfully granted to it for a public purpose, causes an incidental damage to private property, such damage is *damnum absque injuria*. The principle thus enunciated is applicable a fortiori to a public corporation. The same doctrine was declared with reference to tidal streams in *Stevens v. Paterson etc. R. R. Co.*, 34 N. J. L. 532, 3 Am. Rep. 269, where the chief justice said that, "as a general rule, the public domain is subject altogether to the control of the legislature, and that ³⁶⁸ incidental damage resulting to individuals from the exercise of such control gives no legal claim to compensation."

We have, therefore, the city of Newark, a public corporation, executing within the bounds of its discretion and with care a franchise lawfully granted to it by the legislature for a public purpose, but thereby producing consequential damage to the complainants. Such damage is a loss for which there is no remedy; it is a burden to which the sufferers must submit as members of the community from which they receive compensatory benefits.

There are decisions in the courts of this state to the effect that even negligence on the part of a public corporation in the performance of a public function, whether quasi judicial or ministerial, will not justify an action for damages against the corporation on behalf of a person who has sustained special damage by reason of such neglect. The exact purport of these decisions, and whether consistently with them the aggrieved party might not seek relief by injunction or mandamus, under circumstances otherwise appropriate to those means of redress, we need not now consider, for there is neither allegation nor proof of such negligence in the present case.

Our conclusion is that the intended action of the city is lawful, and therefore the injunction issued out of chancery should be dissolved and the bill dismissed.

MR. JUSTICE DEPUE CONCURRED in the judgment of the court, but wished it to be understood that a land owner situated as was the complainant was entitled to redress if the municipality was guilty of any negligence. After declaring that the Passaic river at Newark was a tidal stream, that the title to tidal streams below ordinary high-water mark was in the state as an absolute owner, that the acts of the legislature of the state were sufficient to authorize the construction of the sewers complained of, that the inchoate right which the owner of uplands had to acquire an exclusive right in property by the wharfing out and improving the same gave him no property in the land while it remained under water, he added:

"The problem for solution, then, is the consideration of the scope of the legislative authority granted to the city to connect its sewers with the Passaic, in respect to the rights of a riparian owner who has improved and acquired a property in his improvements by reclaiming and wharfing out. I am unwilling to assent, even sub silentio, to the proposition that under our law the city of Newark may vent its sewage into the river ad libitum, to the destruction of wharves and docks on the Passaic of great value and of incalculable public benefit, without the owners of such property being entitled to a remedy by action or otherwise. Such, in my judgment, is not the law of this state.

"The evidence in this case shows that the complainants have sustained a serious injury by the discharge of earth and sewage into the stream from the city sewer at Ballantine's dock, which was carried by the water to and in front of the complainants' dock; that the complainants' dock has thereby been filled up from year to year by the refuse coming down from the sewer, so that occasionally the dock had to be dredged out. The gravamen of the complaint in this bill is the apprehension of the same or greater injury in that respect by the opening of the proposed sewer nearer to their property. The injury complained of and apprehended is purely an injury to private property, in which the public is in no sense concerned. For such an injury done without legislative sanction an action will lie.

"The city justifies under the power conferred on it by the legislature. The issue in this case presents the construction and effect of the powers granted by the legislature to the city for the use of the Passaic for sewerage, with respect to injuries sustained by the owners of improved riparian property, for which, without competent legislative authority, an action or injunction might be maintained. The legal rules that control where an injury to private property is occasioned in the course of the exercise of legislative authority were adjudged in *Beseman v. Pennsylvania R. R. Co.*, 50 N. J. L. 235, 13 Atl. 164; affirmed in this court, 52 N. J. L. 221, 20 Atl. 169. The suit was brought by an owner of property adjacent to the tracks of the company's railroad, alleging an injury from the use of the company's track for the passage of locomotives and cars in the transportation of cattle, sheep, swine, manure, and other freight, so as to render his dwelling-houses unfit for habitation, and that it wrongfully allowed its cars loaded with such freight, both in the daytime and at all hours of the night, to stand upon said track, emitting noisome odors, etc., and shifted and distributed its cars, and blew the whistles of its locomotives, and causing great and unusual noises, etc., and jarring the doors and walls of said dwelling-houses, etc., whereby, etc. To the declaration the defendant pleaded its chartered right to build a railroad, and that it used the same in the prosecution of its business as a common carrier of passengers and freight, as it lawfully might do, and did thereby necessarily create some smell and some noise, and did necessarily shift and distribute its cars, and did necessarily transport thereon cattle, sheep, swine, manure, and other freight, as it lawfully might do, without that, etc. This plea was demurred to, and the chief justice, in sustaining the plea, placed his opinion on the stable ground that the franchises granted to the defendant legalized the running of trains and the transportation of freight by the company, and the acts complained of being themselves lawful, those incidental injuries which necessarily and unavoidably resulted from the ex-

exercise of legislative authority, if prosecuted in all respects with care and skill, were *damnum absque injuria*. It will be observed that the chief justice in the decision of this case qualifies the doctrine on which the Stevens case was decided, and limited the immunity of such public body from liability for damages resulting to individuals from the exercise of legislative control to those incidental injuries which necessarily and unavoidably result from the exercise of legislative authority, and added a condition that the franchises granted should be exercised with due care and skill. The difference in this respect between the decisions in the two cases was eminently proper. In the first case the chief justice was dealing with the right of a riparian owner who had acquired no property by improving his connection with the tidal stream, and in the other case the injury was to an owner of adjacent lands whose property was affected in the exercise of public franchises under legislative authority.

"The doctrine adjudged in the Beseman case accords with the decisions of the English courts: *Vaughn v. Taff Vale Ry. Co.*, 5 Hurl. & N. 679; *Hammersmith Ry. Co. v. Brand*, L. R. 4 H. L. 171; *L. B. etc. Ry. Co. v. Truman*, L. R. 11 App. Cas. 45. In these cases the injuries, the subject of suit, were such as resulted from the operation of railways under legislative authority, and it was held that an action would not lie for damage necessarily resulting from the exercise of the powers of an act of parliament; that a cause of action could arise only from negligence in the execution of the statutory powers.

"These decisions were made upon statutory powers granted to private corporations in the exercise of public franchises for their own emolument. The legal rule thus established has greater support in reason and in public policy with respect to municipal bodies upon which devolve the duty of providing sewers for the health and comfort of the inhabitants. It was applied to the construction and operation of a sewer built and managed by a public body under statutory authority, and held that as it was a public body acting in the discharge of a public duty, and as that which happened was only the inevitable result of what parliament had authorized them to do, they were not liable: *Dixon v. Metropolitan Board of Works*, L. R. 7 Q. B. Div. 418. In *Geddis v. Proprietors of Bann Reservoir*, 3 App. Cas. 430, 435, the defendants were incorporated by statute to make and maintain by means of a reservoir a constant water supply for owners of mills situate on the river Bann. To do this they had power to collect waters into a reservoir, from which water was from time to time to be sent down to the river through a channel in a stream called Muddock, and they had power to maintain, widen, deepen, and cleanse proper channels and watercourses, etc. The plaintiff's property was injured by flooding as the result of the defendants

permitting to pour down through the channel of the Muddock more water than it would hold. In the house of lords it was held that the plaintiff was entitled to recover an action for damages, on the ground that the defendants, having power to widen and deepen the channel of the Muddock sufficiently to contain the water, were bound to do so before sending the water down. Lord Blackburn, in his opinion, states the principle in these words: 'It is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to any one; but an action does lie for doing that which the legislature has authorized, if it be done negligently. And I think that if by a reasonable exercise of the powers either given by statute to the promoters, or which they have at common law, the damage could be prevented, it is, within this rule, "negligence" not to make such reasonable exercise of their powers.'

"The principle adjudged in the Beseman case was applied by the supreme court of the United States under circumstances identical with those in this case: *Boston v. Lecraw*, 17 How. 426, 437; *Richardson v. Boston*, 19 How. 263, 270. These two decisions were upon the same facts and in relation to the same property. The city had power by statute to construct its sewers into tide water, and the owner had erected a wharf on adjoining property. The first case was by the tenant in possession, the other by the owner. In the first case it was held that an injury to the wharf arising from the construction of the sewer into tide water was *damnum absque injuria*, but in the second case it was held that if the drain constructed by the city was not carried out sufficiently to discharge its contents so as to be swept off by the tides, but caused an accumulation of matter at the outer end of the plaintiff's wharves, insomuch that vessels could not approach with the same depth of water as formerly, that was an injury to the plaintiff, for which he was entitled to recover.

"The use of the Passaic river by the city as an outlet for its sewers being lawful, such incidental injuries as necessarily and unavoidably result from the exercise of such legislative authority are *damnum absque injuria*, but for injuries arising from negligence, the city, being without the protection of legislative authority, is responsible therefor to the owners of improved riparian property. For it will be observed that the legal rule which exempts public bodies from liability to pay damages for injuries to private property applies only to those incidental injuries which necessarily and unavoidably result from the exercise of the legislative authority.

"The city justifies under the power contained in its charter. In its answer it describes the construction and use of the proposed sewer as the best plan that could be devised by ventilation and

otherwise, to prevent the venting of fermented and foul sewage into the river, the location and use of the sewer, etc., with great particularity. The answer of the city to the bill of complaint as a justification conforms in principle to the plea in the Beseman case. These averments present an issue for decision in this case; in fact, the real issue on which this litigation should be disposed of. An answer justifying under the city charter, which authorized the city to connect its sewers with the Passaic, without such averments as are contained in this answer, with respect to the location, construction, and use of this sewer, would have been imperfect and would be struck out. And on the testimony taken prominence was given to evidence explanatory of the location, mode of construction, and adaptability of the proposed sewer to lessen the injury to private property that might be affected by the sewerage. By the evidence it appears that the sewer proposed to be constructed by the city is four thousand three hundred and forty-seven feet in length, with an opening into the Passaic six feet in diameter, and extending below low-water mark. It extends into sewer districts Nos. 5 and 6 of the city. District No. 5 embraces an area of two hundred and twenty-three acres, and the sewer now in that district is discharged into the Passaic at Ballantine's dock, two hundred and fifty-four feet north of the complainants' property. District No. 6 embraces five hundred and sixty-two acres, and the sewer now in that district is discharged through Market street into the Passaic at the city dock, two thousand feet south of the complainants' property. Into the proposed sewer will drain two hundred and ninety-five acres in a thickly populated portion of the city, having a population estimated at twenty thousand. The necessity for this sewer arises from the fact that the sewerage in these two districts has become inadequate because of the increase of storm water, and a nuisance was created by the overflow of the sewers in times of heavy rains, lifting off the covers of the manholes and discharging sewage into the streets and flooding the cellars. The proposed sewer was designed as a means of relief. Upon the construction of this sewer it is not proposed to dispense with the sewers that are now in existence in these districts. The sewer begins in Arlington street, near the Market street sewer, crosses sewers that are connected with the sewer system emptying into the Passaic at the city dock and at Ballantine's dock, and is designed to carry off storm water, which might accumulate at the time of severe rains. Necessarily it would take up some part of the house sewage. Otherwise than relieving that portion of the city that was flooded at times of severe rains from the overflow of water, the proposed sewer did not increase the sewage carried into the river by the sewers already in existence. The separation of the fluids in sewage from the solid matter appears to be a step in the right direction.

The plan for construction provides for ventilated manholes every two hundred feet for the purpose of relieving the sewer from the evolved gases and the delivery of the sewage at the mouth of the sewer, as far as possible, in an unfermented state. This method of constructing sewers is of recent adoption. The testimony of the witnesses, who are experts on the subject, makes it clear that a sewer constructed with such ventilation as the sewage proceeds from the intake to the outlet will relieve the outlet in a great measure from the foul gases usually discharged. Mr. Schaeffer, a witness called by the complainants, says that perforated covers placed over the manholes would prevent decomposition by admitting fresh air and causing the interior of the sewer to be kept cooler and less liable to be in a condition for decomposition to take place; therefore, the sewage would be deposited at the outlet more freely in its natural state. Dr. Disbrow testifies: 'There is no danger from sewerage poison if the sewage is active. As long as it flows with plenty of ventilation there is no danger whatever. If the ventilation were every two hundred feet, enough oxygen would be supplied to dilute the gas sufficiently for its complete oxidation or burning up, and would be the only scientific way to construct a sewer. If it were so constructed there could not be at the point of discharge any obnoxious odors or gases that would be injurious or affect anyone.'

"Dr. Wallace says: 'The sewer is to be constructed with perforated manholes. With these, any gases which might arise through decomposition would be liberated. There would not be much smell at point of discharge. Gas would not be liberated if the discharge was below the surface of the river, as it would if it dropped down into the river.'

"Ernest Adams says: 'The perforated tops in sewers help to create a current of air, and are considered to be the only method, or one of the best methods, to ventilate sewers.' It is a fair deduction from the evidence, with respect to ventilation in the course of the sewer, that the emission of foul gases in the other sewers, such as that at Ballantine's dock and the city dock sewer, was probably due to the fact that the sewage was not subjected to the ventilating process in its passage to the river.

"For the purpose of determining what acts of a city in the construction and use of its sewers are or are not actionable, the distinction is between the duties of a municipality which are judicial or quasi judicial and those which are ministerial. With respect to the former, no action is maintainable, and a remedy by action is given only for negligence in performing such duties as are ministerial. In *Attwood v. Bangor*, 83 Me. 582, 22 Atl. 466, the action was to recover damages for the unlawful location, construction, and maintenance of a sewer below low-water mark in the Penobscot river, whereby the plaintiff's dock was rendered

less valuable by reason of the liability of vessels to ground on the end of the sewer and on the sediment flowing out of it. It was held by the court that the city had a right to extend its sewer across the flats of the river to a point below low-water mark; that in the performance of its duty to the public in locating sewers for the drainage of the city the city council acted judicially, and for that judicial act the city was under no common-law liability; but if the construction was improperly and unskillfully made it was a ministerial act, for which the city might be made liable to any party injured thereby. The same distinction between the duties of municipal authorities with respect to acts that are of a quasi judicial nature, involving the exercise of judgment and discretion and depending upon considerations affecting the public health and general convenience throughout an extensive territory, and ministerial duties, such as the construction and repair of sewers, was adopted in the supreme court of the United States in *Johnston v. District of Columbia*, 118 U. S. 19, 6 Sup. Ct. Rep. 923. To the same effect are *Morse v. Worcester*, 139 Mass. 389, 2 N. E. 694; *Child v. Boston*, 4 Allen, 41, 81 Am. Dec. 680; *Franklin Wharf Co. v. Portland*, 67 Me. 46, 24 Am. Rep. 1; *Lynch v. Mayor of New York*, 76 N. Y. 60, 32 Am. Rep. 271; *Clark v. Peckham*, 10 R. I. 35, 14 Am. Rep. 654.

"The complainants have no cause of complaint that the outlet of this sewer is nearer their property than the sewers already in the river. The location of the outlet of a public sewer is necessarily committed to the discretion of the public authorities. The proper place for such location is determined by public necessity and convenience, and the decision of the municipal authorities on this subject is conclusive, because it is the exercise of a discretion reposed in them by law and not reviewable by the courts: *Attwood v. Bangor*, 83 Me. 582, 22 Atl. 466; *Morse v. Worcester*, 139 Mass. 389, 2 N. E. 694; *Lynch v. Mayor of New York*, 76 N. Y. 60, 32 Am. Rep. 271; *Stoudinger v. Newark*, 28 N. J. Eq. 187. This whole subject is considered and decided by the supreme court of Massachusetts in *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592. In that case the plaintiff was the owner of land abutting on a natural stream running through the city. He sued the city for the violation of his rights as riparian owner in polluting its waters so as to render them unfit for mechanical and other purposes. The drains and sewers were constructed by the city under authority conferred upon the common council by the city charter. The ground of liability was that dirt, filth, and other materials were carried into the stream by means of these drains and sewers. It was held that the plaintiff could not recover against the city for the pollution, so far as it was attributable to the plan of sewerage adopted by the city, but that a recovery might be had so far as it was attributable to the im-

proper construction or unreasonable use of the sewers, or to the negligence or other fault of the city in the care or management of them; that for the incidental disadvantage, loss or inconvenience necessarily resulting to individuals in their rights of property from the maintenance and use of the drains in a proper and reasonable manner, without negligence in their care and management, no action could be maintained; but in the construction of works so laid out, the town or city is responsible that it will be done in a proper manner and with a reasonable degree of skill and care; and if for want thereof any unnecessary injury is caused to the property or rights of individuals the town or city may be charged therewith. This case has been discredited as applied to private waters, where reasonable use is the measure of the right of the upper proprietor; but the doctrine of the case is abundantly supported upon principle and authority as to tidal streams, where the right of the public has been derived from the state to use its property, and maladministration of the powers conferred is the condition of responsibility.

"It must be assumed that the city in the exercise of its rights will make all reasonable efforts to avoid injury either to riparian owners or to the health and comfort of its inhabitants. If, by the use of the river for sewers by the city or by other places along the river, its condition has become such that such use should be prohibited or regulated, the subject devolves upon the legislature to prohibit or regulate as in its judgment may seem fit. In England, statutes regulating sewers and the use of streams for that purpose have been passed, some of which are referred to in 16 English Ruling Cases, 413, 427, 619, 628. From an early period in England a body known as commissioners of sewers has been in existence, with extensive powers and control over the subject: 5 Com. Dig. 453, tit. 'Sewers'; 6 Chit. Burn J. 593.

"Under the law of the state the city has the right to construct this sewer, with an outlet into the Passaic river at such a point as the duly constituted authorities of the city in their judgment should adopt. If by reason of fault in the construction or management of the sewer injury to private property is sustained, redress may be had therefor by an action for damages, and injunction may become the appropriate remedy, but the evidence makes no case for an injunction quia timet.

"For the reasons above given, I concur in the decision of this court reversing the decree of the court of chancery and dismissing the complainants' bill."

STREAMS—POLLUTION OF.—THAT A CITY may be enjoined, at the instance of a riparian owner, from discharging its sewage into a stream, see *Platt v. Waterbury*, 72 Conn. 531. 77 Am. St. Rep. 335, 45 Atl. 154. Yet in *Valparaiso v. Hagen*, 153 Ind. 337, 74 Am. St. Rep. 305, 54 N. E. 1062, it is said that as a city has a

right to discharge its sewage into a natural watercourse extending through it, where there is no other method of discharging the sewage, a court of equity will not enjoin such discharge, though the waters of the stream are polluted to the injury of lower riparian proprietors, where the city acts in conformity with the law governing it, and without negligence: See, further, *Grey v. Mayor and Aldermen of Paterson*, 60 N. J. Eq. 385, post, p. 642, 45 Atl. 994; monographic note to *Winchell v. Waukesha*, 84 Am. St. Rep.

GREY v. MAYOR AND ALDERMEN OF PATERSON.

[60 N. J. Eq. 385, 45 Atl. 994.]

A MUNICIPAL CORPORATION IS NOT RESPONSIBLE for those incidental damages which result from the proper exercise of its functions, and such exercise will not subject it to the charge of maintaining a public nuisance.

NAVIGABLE, TIDAL WATERS.—THE TITLE OF RIPARIAN OWNERS in navigable waters where the tide ebbs and flows extends only to high-water mark, and the state is the absolute owner of the beds of the waters beyond that mark.

WATERS, WHAT PUBLIC AND WHAT PRIVATE.—The test by which to determine whether waters are public or private is the ebb and flow of the tide, though such waters are navigable in fact.

RIPARIAN OWNERS ON A NAVIGABLE STREAM ABOVE THE POINT WHERE THE TIDE EBBS AND FLOWS have title to the bed of the stream to the middle thereof, subject only to the right of the state to regulate navigation.

A MUNICIPAL CORPORATION SITUATE UPON A NAVIGABLE, TIDAL STREAM has no rights in the waters thereof distinct from the rights of the general public, nor does the legislative permission to it to withdraw such quantity of water as may be necessary to furnish a pure and wholesome supply, create a right which is beyond the power of the legislature to subsequently impair by authorizing another municipal corporation to construct sewers and drains into, and hence pollute the waters of, such stream.

A MUNICIPAL CORPORATION CANNOT BE AUTHORIZED by the legislature to pollute a fresh-water stream, or a stream above the ebb and flow of the tide to the injury of riparian owners thereon.

INJUNCTION—REFUSAL BECAUSE OF EXTREME HARDSHIP.—If a municipal corporation has, at great expense, constructed and put in operation, and for a long series of years has used and enjoyed, a system of sewerage, accommodating a population of one hundred thousand people, an injunction against the continued use of such system must be refused, on the ground that it would be inequitable to give such relief, if relief can otherwise be afforded, as by making just compensation in money.

THE GRANT OR REFUSAL OF AN INJUNCTION IS A MATTER RESTING IN THE SOUND DISCRETION of the court.

Where it would cause great injury to the defendants, and might be of serious detriment to the public without a corresponding advantage to the complainant, it will not be granted.

Suit by the attorney general on the relation of twenty-four persons to restrain the city of Paterson from discharging its sewage into the Passaic river, which flows through that city. The relators were riparian owners. There was in the bill complaint of injury to specified rights of the relators which they could not suffer except through riparian ownership above the ebb and flow of the tide, and as no special demurrer was interposed, this was treated as an allegation of such ownership. A demurrer interposed to the bill was overruled, and an injunction directed to issue. The defendants, the mayor and aldermen of the city of Paterson, therefore appealed.

Thomas C. Simonton, Jr., and Eugene Stevenson, for the appellants.

Samuel H. Grey, attorney general, McEwan & McEwan, James B. Vredenburg, and John P. Stockton, for the respondents.

386 VAN SYCKEL, J. The information and bill of complaint in this case was filed by the attorney general, on behalf of the state at the relation of owners and possessors of lands along the banks of the Passaic river, to restrain the city of Paterson from depositing or discharging its sewage through its drains or sewers into the Passaic river, and from constructing new sewers to discharge into said river and from enlarging or increasing its present sewage system with outlets into said river. Thereupon an order to show cause was granted why an injunction should not issue as prayed for in said information and bill. Upon the hearing of this order affidavits were presented by the defendants. To the information and bill the city interposed a demurrer.

Upon the twenty-eighth day of March, 1899, the chancellor overruled the demurrer and ordered an injunction, in which order it is recited "that upon reading the information and bill of complaint and the affidavits annexed thereto, and upon reading the demurrer of the defendants to the said information the bill and the affidavits presented by the defendants upon said order to show cause, the chancellor being of opinion that the defendants' acts in discharging sewage into the Passaic river in the manner set forth in said information and affidavits constituted a public nuisance, it is ordered that an injunction do issue enjoining and restraining the mayor and aldermen of the city of

Paterson, until the further order of said court, from discharging sewage or permitting sewage to be discharged, directly or indirectly, into the Passaic river, above tide water through any public sewer or sewers of said defendants, constructed or to be constructed, which do not now discharge directly or indirectly into said river."

From the order overruling the demurrer and also from the order for injunction an appeal was taken to this court.

³⁸⁷ The affidavits, therefore, which were considered by the chancellor in making the order for injunction are part of the case as presented by the appeal to this court.

In 1867 the legislature passed a supplement to the charter of the city of Paterson, by the seventeenth section of which it is provided: "That the mayor and aldermen of the city of Paterson are hereby authorized to cause such surveys, maps, and returns to be made, as maybe necessary to enable them to prescribe and adopt, either for the whole or any part of said city, the location of streets and sewers, or either, and the width thereof, hereafter to be opened or constructed therein, and when such location, width, and grade shall be adopted, the surveys, maps, and returns prescribing and defining the same shall be recorded in the clerk's office of the county of Passaic, and thereupon no street or sewer shall thereafter within the district comprised in any such survey, map or return be opened or constructed, except in conformity therewith as to location, width, and grade, and fully to accomplish the purposes contemplated by this section, the said mayor and aldermen may employ such engineers, surveyors, and other persons, and provide for their compensation and pass such ordinances as they may deem to be proper, and may enter upon any land for making surveys and examinations": Pub. Laws 1867, p. 653, sec. 17.

It appears by the affidavits that in January, 1868, General Viele presented a map and report of the city for a general system of sewerage. The map and report were referred to a joint committee of streets and finance to ascertain what legislation would be necessary to enable the city to proceed with the work. Thereupon, under the direction of the public authorities, an act was drafted to enable the city to construct its sewers. On the 26th of February, 1868, an act of the legislature was passed, entitled "An act to authorize the construction of sewers and drains in the city of Paterson." The second section of this act provides: "That all such sewers and drains shall be constructed in conformity with the plans thereof adopted, or which shall be adopted by said mayor and aldermen, pursuant to the seven-

teenth section of the act approved April 4, 1867, entitled 'A further supplement to the act entitled "An act amending and revising the act to incorporate the city of Paterson."'"

By the said act the city was authorized to enter upon any lands for the purpose of making surveys and examinations, and to use ³⁸⁸ the ground and soil under any street, highway, railroad, lane, alley, or court, within the city for the purpose of constructing the works contemplated by the said act. By the last section of the said act it was declared that it should take effect immediately, and be deemed to be a public act: Pub. Laws 1868, p. 126. Under the sanction of this legislation a number of sewers, which are now part of the sewer system of the city, were constructed.

By an act passed in 1871 (Pub. Laws 1871, p. 803), the city charter was revised and therein the power to construct sewers was continued. By the said affidavits it appears that all the sewers constructed under this legislation discharged into the Passaic river, and that at least up to the year 1872 the only system of constructing sewers which had been adopted in this country was by building them underground, with the outlet into the natural watercourse on the banks of which the city was built.

From this recital I think it sufficiently appears that the city of Paterson had legislative authority to construct the system of sewers, the use of which the complainants seek by their information and bill to restrain. Full power was conferred by this legislation upon the city of Paterson to adopt and execute its own plan of sewerage so far as the rights of the state were concerned.

If the power inhered in the legislature to bestow such authority upon the city, it is the settled law of this state that the municipal corporation is not responsible for those incidental damages that result from the proper exercise of their functions, and such exercise will not subject it to the charge of maintaining a public nuisance: *Beseman v. Pennsylvania R. R. Co.*, 50 N. J. L. 235, 13 Atl. 164; same case affirmed, 52 N. J. L. 221, 20 Atl. 169. So far as the authority of the state can avail for that purpose, the legislative consent furnishes ample protection to the city for the appropriate exercise of granted power.

Since the decision of *Stevens v. Paterson etc. R. R. Co.*, in this court, reported in 34 N. J. L. 532, 3 Am. Rep. 269, it has been the conceded law that the title of the riparian owner on the ³⁸⁹ navigable waters of the state, where the tide ebbs and flows, extends only to high-water mark, and that the state is the absolute owner of the bed of the waters beyond high-water

mark. This adjudication leaves the riparian owners of lands on the Passaic river where the tide ebbs and flows without the right to relief.

This question is discussed and settled in the opinion of this court in the case of *Sayre v. Mayor etc. of Newark*, 60 N. J. Eq. 361, ante, p. 629, 45 Atl. 985, decided at the present term, and it is, therefore, unnecessary to refer to other authorities. But in that case the alleged injury affected only owners on tide water; the rights of those above the flow of the tide are in nowise involved in the decision of the *Sayre* case. In *Cobb v. Davenport*, in our supreme court, 32 N. J. L. 378, Mr. Justice Depue says: "That by the common law all waters are divided into public waters and private waters. In the former, the proprietorship is in the sovereign, in the latter, in the individual proprietor. The title of the individual, being personal to him, is exclusive, subject only to a servitude to the public for purposes of navigation, if the waters are navigable in fact. The test by which to determine whether waters are public or private is the ebb and flow of the tide. Waters in which the tide ebbs and flows, so far only as the sea flows and reflows, are public waters; and those in which there is no ebb and flow of the tide are private waters."

In the case of *Attorney General v. Delaware etc. R. R. Co.*, 27 N. J. Eq. 631, the case of *Cobb v. Davenport*, 32 N. J. L. 378, is cited with approbation. In pronouncing the opinion of this court, Mr. Justice Dixon said that the bed of the Delaware river above tide water is private property, subject to the paramount public right to use the river as a common highway, in which is included the right to preserve and improve the navigability of the water. No other qualification or restriction of the private ownership was intimated.

The English cases sustaining the right to sewer into fresh-water streams, under license from parliament, are not authority here. Our legislature has not like unlimited power to legalize a grant which is hostile to the interest of the riparian owner, ³⁹⁰ without providing compensation as enjoined by our state constitution. There is no such limitation upon the power of the British parliament.

The learned justice who delivered the opinion in the case of *Attorney General v. Delaware etc. R. R. Co.*, 27 N. J. Eq. 631, is too accurate in his statement of legal principles to have omitted to mention the right of a city above tide water to make the river an outlet for its sewers, if such a right in his judgment existed. It would be a barren title if the owner could not invoke

the aid of the law to preserve it from destruction. It must, therefore, be concluded that the riparian owners on the Passaic river, above the point where the tide ebbs and flows, have title to the bed of the stream to the middle thereof, subject only to the right of the state to regulate navigation, so far as the water may be navigable.

The relators, in the information of the attorney general, who are riparian owners above the flow of the tide, have a right of property in the river, and in that respect the legal rule applicable to them differs essentially from that which pertains to those below them, where the tide ebbs and flows.

In *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592, and in the more recent case of *Valparaiso v. Hagen*, 153 Ind. 337, 74 Am. St. Rep. 305, 54 N. E. 1062, in opinions of much force, it is held that where sewers emptying into fresh-water streams are constructed under legislative authority, the riparian proprietor cannot recover for the pollution of the stream, so far as it is attributable to the authorized plan of sewerage adopted by the city, but only in case the injury results from improper construction or unreasonable use of sewers, or negligence of the city in the care of them. Assent cannot be given to the correctness of these decisions, as they are not in harmony with the adjudications of our own legal tribunals.

In *Beach etc. Mfg. Co. v. Sterling Iron etc. Co.*, 54 N. J. Eq. 65, 33 Atl. 286, Vice-Chancellor Pitney, in his able review of the authorities, criticised the case of *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592, and said that so far as the expressions there used favor the notion that a city or town may collect and discharge sewage matter into a fresh-water stream to the injury of a riparian owner, and without liability³⁹¹ to action, they are contrary to the law as held in England for centuries. The decree in that case recognizing the right of the riparian owner was unanimously affirmed in this court upon the opinion of the vice-chancellor in *Sterling Iron etc. Co. v. Sparks Mfg. Co.*, 55 N. J. Eq. 824, 41 Atl. 1117.

Riparian owners above tide own *ad medium filum aque*, and have a property right in the water flowing along and over their land. This property right cannot be impaired except by the lawful use of the waters by riparian owners higher up the stream. Lower owners must submit to such pollution as results from the natural or reasonable use of the owners above, produced by the surface drainage or by the percolation of offensive matter through the soil. But the higher owners cannot lawfully combine and by construction of artificial conduits collect foul matter and

pour it in mass into the stream. Such a scheme, when put into operation, constitutes the taking of private property, which the legislature cannot authorize except upon just compensation to the party injured.

The rights of such riparian owners are clearly stated in the opinion of Mr. Justice Lippincott, in this court, in the case of *East Jersey Water Co. v. Bigelow*, 60 N. J. L. 201, 38 Atl. 631. By reason of the location of the Jersey City waterworks upon the tidal stream, the mayor and common council of Jersey City, complainants in this suit, have no rights in the waters of the stream distinct from the rights of the general public therein, nor are they endowed with superior rights by the legislature of 1852: Pub. Laws 1852, p. 419.

That legislation did not guarantee or assure to Jersey City the purity of the water, nor did it vest in Jersey City any part of the state's title in the tidal waters, upon which its present claim can be established and enforced. It was simply the consent of the state that Jersey City might withdraw such quantity of water from the Passaic as might be required to furnish a supply of pure and wholesome water. This provision was intended to qualify and limit the extent of the grant, so that the implication could not arise that Jersey City ³⁹² might without further legislation divert the water for other purposes than a water supply for domestic and other like purposes.

At the time of the legislative grants to the city of Paterson in 1867-1868 and 1871, it would have been competent for the legislature to pass a law prohibiting the further use of the Passaic water in Jersey City, and compelling the city to procure its water elsewhere. Therefore, the grant to Paterson must be regarded as a repeal by implication of the previous grant to Jersey City, if it was an impairment of that grant, which cannot be conceded: *Newark Aqueduct Board v. Passaic*, 45 N. J. Eq. 393, 18 Atl. 106. Jersey City is without a standing to invoke the injunction power in this case.

Ordinarily, where the riparian owner is injured by an unlawful diminution of the quantity of water, or by its excessive pollution, when his legal right is established, he is entitled to the exercise of the injunction power of a court of equity.

Whether, in this case, the restraining order of the court should be interposed for the protection of the riparian owners above tide water, is the remaining question to be considered. That question must be solved by determining whether in the situation of the parties here there is the presence of such circumstances and such equities as may justify this court in withholding its

restraining arm. On the one hand, the riparian owner is entitled to redress in respect of the deprivation of his property. On the other hand, the city of Paterson, at an enormous expense, has put into operation under legislative authority, and for a long series of years has used and enjoyed, a system of sewerage which accommodates a population of over one hundred thousand people. By the restraint prayed for, this sewerage system will be suddenly destroyed, and the homes of this multitude of people will be rendered perilous to health and life, and unfit for occupancy.

While the city cannot, upon this continued acquiescence of these riparian owners, predicate the right to deprive them of their property in the stream, yet, in view of such acquiescence, and the magnitude of the injury which would fall upon the ³⁹³ public by prohibiting the use of the sewers, it would be inequitable to enjoin, if relief can otherwise be afforded. The relators are here asking equity and they must do equity. A substituted remedy by giving them adequate compensation for their injury would be a just disposition of the controversy.

The granting or refusing of an injunction is a matter resting in the sound discretion of the court. Where it would cause great injury to the defendants and might be of serious detriment to the public, without corresponding advantage to the complainant, it will not be granted. The authorities are collected in Stewart's Digest, 620, sections 7, 10.

In *Morris etc. R. R. Co. v. Prudden*, 20 N. J. Eq. 531, Mr. Justice Depue, in delivering the opinion of this court, said: "That an injunction ought not to be granted when the benefit secured by it to one party is of little importance, while it will operate oppressively, and to the great annoyance and injury of the other party, unless the wrong complained of is so wanton and unprovoked in its character as properly to deprive the wrongdoer of the benefit of any consideration as to its injurious consequences"; and he recognized the fact of acquiescence as a consideration of importance in determining whether the defendants should be restrained.

In the case before us the injury to the defendants would be so great that an injunction should not be granted to these complainants whose injury is incidental and comparatively small. If these complainants amend their bill, or file a new bill asking for an injunction, unless the city will consent to make such compensation for the diminution in the value of their lands as shall be ascertained to be just, such equitable relief can be given to them.

A court of equity will, to effectuate justice, settle unliquidated damages: *Coster v. Monroe Mfg. Co.*, 2 N. J. Eq. 467; *Ingersoll v. Newton*, 60 N. J. Eq. 399, 45 Atl. 596. Those riparian owners above the flow of the tide have the right, if they so elect, to pursue their remedy at law, by instituting suits for damages. In that event, the city would be driven to file its bill to restrain the suits, offering to make just compensation.

³⁹⁴ That procedure was taken in *Paterson etc. R. R. Co. v. Kamlah*, 42 N. J. Eq. 93, 6 Atl. 444, and approved in this court, the decree being unanimously affirmed: *Paterson etc. R. R. Co. v. Kamlah*, 47 N. J. Eq. 331, 21 Atl. 954.

The injunction should be vacated and the record remitted to the court of chancery, and the case proceeded with in accordance with the views herein expressed.

STREAM—POLLUTION OF.—ON THE RIGHT OF A CITY to discharge its sewage into a stream to the injury of riparian proprietors, see *Sayre v. Mayor and Common Council of Newark*, 60 N. J. Eq. 361, ante, p. 629, and note, 45 Atl. 985. It is held in that case that the legislature may authorize a municipality to use tidal, navigable streams within its borders for sewerage purposes, though such use causes some defilement. But in *Watson v. Milford*, 72 Conn. 561, 77 Am. St. Rep. 345, 45 Atl. 167, it is held that if a municipal corporation creates a nuisance on the land of a lower riparian proprietor by discharging its sewage into a stream, it is liable therefor: See, also, *Trevett v. Prison Assn.*, 98 Va. 332, 81 Am. St. Rep. 727, 36 S. E. 373.

COLTON v. DEPEW.

[60 N. J. Eq. 454, 46 Atl. 728.]

THE STATUTE OF LIMITATIONS DOES NOT APPLY TO COURTS OF EQUITY, but proceedings in equity to enforce a legal right are within the spirit and meaning of the statute, and have always been so considered. If the matter in controversy in such a court is of a purely equitable nature, not cognizant in a court of law, the statute of limitations has no effect, but the court may apply the doctrine of neglect and lapse of time according to discretion, regulated by precedents and peculiar circumstances, but when the two courts have concurrent jurisdiction, and also when the aid of equity is invoked on account of special circumstances, such as the need of discovery, the difficulty of proceeding at law or the like, the statute is as effectual a bar as at law, with the qualification that, in case of fraud, it commences running with the discovery of the fraud.

THE STATUTE OF LIMITATIONS DOES NOT EXTINGUISH A DEBT, but merely takes away a remedy for its enforcement.

A STATUTE OF LIMITATIONS DOES NOT OPERATE AGAINST A SUIT TO FORECLOSE A MORTGAGE until the mortgagee's legal right of entry upon the lands mortgaged, as well as his right of action upon the debt, is barred.

A MORTGAGEE HAS TWO REMEDIES, one upon the bond or other evidence of indebtedness, and the other by a suit upon the mortgage. The operation of the statute of limitations against one of these remedies does not necessarily affect the other.

SUIT BY MORTGAGEE, WHEN ACTION UPON THE DEBT IS BARRED.—The fact that the statute of limitations prevents a mortgagee from maintaining an action upon the bond or other evidence of indebtedness to secure the payment of which the mortgage was given, does not prevent him from prosecuting with success a suit to foreclose the mortgage.

THE STATUTE OF LIMITATIONS AGAINST A SUIT BY A MORTGAGEE does not begin to run until the possession becomes adverse to him. The possession of the mortgagor by the sufferance or forbearance of the mortgagee cannot become adverse until the mortgagor ceases to recognize the mortgagee's title by the payment of interest. Such payment is plenary evidence that, up to that time, the possession of the mortgagor had not become adverse.

INTEREST, RATE OF, WHEN NOT CHANGED BY INDORSEMENT.—If, upon a bond secured by a mortgage, the president of the corporation holding the premises makes an indorsement that, in consideration of the extension of the time of payment, the rate of interest shall, after such indorsement, be changed from six per cent to seven, but the indorsement is not made in a manner binding the corporation, it must be disregarded, though the bond and mortgage were permitted to stand without any attempt to enforce them for many years after the making of such indorsement.

Suit to foreclose a mortgage made on January 3, 1863, by Nathaniel Dole, then the owner of the mortgaged premises. The mortgagee on the same day assigned the mortgage to Jane Van Horn. She subsequently died, and her surviving executor, on September 29, 1882, assigned it to the complainant. The mortgagor conveyed the mortgaged premises on August 1, 1865, to Delacroix. There was no agreement that the latter would assume the payment of the mortgage or that it should be deemed part of the consideration. He, on December 31, 1870, conveyed to the Weehawken Ferry Company, which on July 9, 1884, conveyed to Simpson, who, on May 19, 1885, conveyed to Sims, who, on May 26, 1893, conveyed to the defendant, Chauncey M. Depew. A decree was entered foreclosing the mortgage, and the defendants, Chauncey M. Depew and the West Shore and Ontario Terminal Company, appealed therefrom. In this decree interest was allowed at the rate of six per cent annually, and the complainant therefore appealed from such part of the decree, claiming interest at the rate of seven per cent per annum under the indorsement shown in the opinion of the court.

Randolph W. Parmly and Charles L. Corbin, for the complainant.

Vredenburg & Garretson, for the defendants.

456 DEPUE, C. J. The Weehawken Ferry Company became the owner of the mortgaged premises by deed from Delacroix and wife, dated December 31, 1870. This deed conveyed the mortgaged premises subject to the mortgage now in question, and to the Comstock mortgage, with the following clause of assumption: "The payment of which two mortgages, with the interest thereon from this date, is hereby assumed by the party of the second part, making together twenty-three thousand five hundred dollars, which is part of the consideration money expressed in this conveyance."

457 The estate vested in the Weehawken Ferry Company in the mortgaged premises was conveyed to Thomas B. Simpson by a master's deed, dated July 9, 1884. From December 31, 1870, to July 9, 1884, the Weehawken Ferry Company was the owner of the mortgaged premises. The mortgage is dated January 3, 1863, and conditioned for the payment of seventeen thousand dollars in one year after its date. For several years interest was paid by the Weehawken Ferry Company to the assignee of the mortgage, the last payment being made on the 22d of December, 1876. This bill was filed December 18, 1896. The last payment of interest was within twenty years next before the commencement of this suit.

The defendants in their answer set up as the substantial defense in this case: "That the said complainant's alleged cause of action, being on a sealed instrument, for the payment of money only, did not accrue within sixteen years next before the commencement of this suit; and they further say that the said action was not commenced within twenty years after default on said alleged mortgage, and therefore the said complainant is barred of and from any action on his alleged bond and mortgage." The defense thus brought forward presents the question whether the statute of limitations applies to a suit in a court of equity to enforce a mortgage by foreclosing the equity of redemption, and the construction of the statute in a court of law where title in the mortgagor arising from his possession is set up to defeat an action of ejectment by the owner of the mortgage.

In *Shields v. Lozear*, 34 N. J. L. 496, 501, 3 Am. Rep. 256, it was held that "by the common law a mortgage in fee created an immediate estate in fee simple in the mortgagee, subject to

be defeated by the payment of the mortgage money on the day named in the condition, and the mortgagee might enter immediately on the mortgaged premises and hold the estate until the condition was performed. In this state it was held by this court that the right to enter was postponed, and the possession was in the mortgagor, until the condition was broken by default in the payment of the mortgage money: *Sanderson v. Den ex dem. Price*, 21 N. J. L. 646, note. ⁴⁵⁸ With this modification of the rights of the mortgagee, as to the postponement of ability to obtain the possession of the mortgaged premises, the nature of the mortgage, as a conveyance, remains as it was at common law." The conveyance of the mortgaged estate by the owner to the mortgagee is a legal conveyance, on which ejectment may be brought in the same manner and subject to the same defenses and governed by the same legal rules as if the deed of conveyance had been absolute.

A mortgagee has a double security for the payment of his debt, viz., the bond, which is a contract by the obligor to pay, and the mortgage, which is a conveyance of an estate in the mortgaged premises. The bond accompanying the mortgage was executed by Dole. The legal remedy against him on the bond was barred by the statute of limitations, unless saved by his residence out of the state, and he was discharged from his liability thereon by a discharge in bankruptcy, January, 1868.

Neither the statute of limitations, which bars the obligee's right to maintain an action on the bond, nor the discharge of the obligor in bankruptcy, is an extinguishment of the debt. In both instances the remedy is taken away, but the debt remaining would be a valid consideration for a subsequent express promise to pay: *Briggs v. Sutton*, 20 N. J. L. 581; *Whyte v. McGovern*, 51 N. J. L. 356, 17 Atl. 957. Notwithstanding the mortgagee has lost his action at law on the bond, his remedy under the mortgage still remains: *Buswell's Limitations to Actions*, sec. 140, p. 201; 2 *Jones on Mortgages*, sec. 1204; *Wagoner v. Watts*, 44 N. J. L. 126, 129, per *Van Syckel, J.* It was so decided in *Blue v. Everett*, 56 N. J. Eq. 455, 39 Atl. 765. It was there held that in order to deprive the holder of a bond and mortgage of his bill in chancery to collect the debt by the sale of the mortgaged premises, the legal right of entry upon the lands mortgaged, as well as the legal right of action on the bond, must be barred.

The statutes of limitations do not apply to courts of equity, for the reason that the words of the statutes apply only to particular legal remedies; but proceedings in equity to enforce a

legal right are within the spirit and meaning of the statutes, and have always been so considered. The question has been ⁴⁵⁹ discussed as to whether a court of equity acts in analogy with the statutes or in obedience to them. Lord Redesdale expressed the opinion that where there was a legal right which became cognizable in a court of equity, courts of equity acted in obedience to the statute of limitations: *Hovenden v. Lord Annesley*, 2 Schoales & L. *607. The rule seems to be that if the matter in controversy in a court of chancery is of a purely equitable nature, not cognizable in a court of law, the statute of limitations has no application, but the court will apply the doctrine of neglect and lapse of time according to discretion, regulated by precedents and the peculiar circumstances; but when the two courts have concurrent jurisdiction, and also when the aid of equity is invoked on account of special circumstances, such as the need of a discovery, the difficulty of proceeding at law or the like, the statute is as effectual a bar as at law, with the qualification that in cases of fraud it commences running from the time of the discovery of the fraud: *Lawrence v. Trustees*, etc., 2 Denio, 577, 581. Mr. Justice Story, dealing with this subject, used this language: "The statutes of limitation, where they are addressed to courts of equity, as well as to courts of law, as they seem to be in all cases of concurrent jurisdiction at law and in equity (as, for example, in matters of account), to which they directly apply, seem equally obligatory in each court. It has been very justly observed that in such cases courts of equity do not act so much in analogy to the statutes as in obedience to them. In a great variety of other cases courts of equity act upon the analogy of the limitations at law. Thus, for example, if a legal title would, in ejectment, be barred by twenty years' adverse possession, courts of equity will act upon the like limitation, and apply it to all cases of relief sought upon equitable titles or claims touching real estate. Thus, for example, if the mortgagee has been in possession of the mortgaged estate for twenty years, without acknowledging the existence of the mortgage, it will be presumed that the mortgage is foreclosed, and that he holds by an absolute title. If the mortgagor has been in possession of the mortgaged estate for the like space of time without acknowledging the mortgage debt, it will be presumed to be paid. If the judgment creditor has lain by for ⁴⁶⁰ twenty years without any effort to enforce his judgment, and it has not been acknowledged by the debtor within that time, it will be presumed to be satisfied. And in all these cases courts of equity will act upon these facts as a positive bar to

relief in equity": 2 Story's Equity Jurisprudence, sec. 1520; Angell on Limitations, sec. 26. This general principle has been authoritatively adopted by the courts of this state. In *Conover v. Wright*, 6 N. J. Eq. 613, 47 Am. Dec. 213, Mr. Justice Carpenter, speaking for this court, said: "Whether courts of equity act in obedience or in mere analogy to the statutes of limitations, it has become a settled rule that they will apply them, in similar cases within the sphere of their jurisdiction, equally with courts of law. They have always felt themselves bound by the spirit and meaning of these statutes, and ordinarily act in conformity to them. In cases concurrent with a remedy at law, they always allow them to be pleaded, and a party is not permitted to evade their effect by resorting to another forum." In *Wanmaker v. Van Buskirk*, 1 N. J. Eq. 691, 23 Am. Dec. 748, Chancellor Vroom said: "The statute of limitations does not apply in terms to courts of equity, but it is well known that they have always felt themselves bound by the principles of the statute, and, except in cases of strict trust and matters purely equitable in their nature, have acted in conformity with them." These passages were quoted with approval, with a citation of a considerable number of cases, by Mr. Justice Dixon in *Blue v. Everett*, 56 N. J. Eq. 455, 460, 39 Atl. 765. It will also be observed that in that case, which was for the foreclosure of a mortgage, the complainant's rights under his bond and mortgage were held to be purely legal in their nature, and therefore subject in the court of equity to the application of the statute of limitations.

In an action of ejectment by the mortgagee against the mortgagor or his grantee in possession, the statute of limitations would be a defense. It would be equally available in a court of equity on a bill to foreclose, and upon the same construction that the statute would receive in a court of law. Section 16 of the statute of limitations provides: "That no person who now hath, or hereafter may have, any right or title of entry into lands, tenements, or hereditaments, shall make any entry therein, but within twenty years next after such right or title shall accrue; and such person shall be barred from any entry afterward," ⁴⁶¹ with a proviso not pertinent to this case: Gen. Stats., p. 1027. This section is substantially a re-enactment of the statute, 21 Jacobus I, chapter 16: *Spottiswoode v. Morris etc. R. R. Co.*, 61 N. J. L. 322, 330, 40 Atl. 505. Under the settled construction of this statute mere possession for twenty years will not constitute a bar. In order to acquire title or to defend in ejectment in virtue of the statute, the possession must

be adverse: *Foulke v. Bond*, 41 N. J. L. 528. It does not follow that because the plaintiff's right of possession accrued more than twenty years before suit brought, his right of action is gone, for to produce this result it is necessary to introduce a second factor, to wit, that there has been an adverse possession covering the statutory period: *Van Cleve v. Rook*, 40 N. J. L. 25, 26.

In *Kirk v. Smith*, 9 Wheat. 241, 288, Chief Justice Marshall said: "One of the rules which apply to acts of limitation generally, which has been recognized in the courts of England, and in all others where the rules established in those courts have been adopted, is that possession, to give title, must be adverse. The word is not, indeed, to be found in the statutes, but the plainest dictates of common justice require that it should be implied. It would shock the sense of right which must be felt equally by legislatures and by judges, if a possession which was permissive and entirely consistent with the title of another should silently bar that title": *Wood on Limitation of Actions*, 623. In *Heath v. Pugh*, L. R. 6 Q. B. Div. 345, 359, which was an action of ejectment, and the defense was the statute of limitations (3 & 4 William IV, c. 27), Lord Selborne, speaking of the statute of limitations (21 Jacobus I, c. 16), said: "The possession of the mortgaged land by the mortgagor, during the subsistence of the security, and while the mortgagee did not choose to take possession, was held, at law as well as in equity, to be 'at the will,' or by the 'sufferance,' or 'permission' of the mortgagee, under a 'tacit agreement' which the mortgagee might determine at his pleasure. It was of the nature of the transaction that the mortgagor should continue in possession. His possession was rightful, and not by wrong. He was entitled to the rents and profits as long as he remained in possession; mesne profits accrued due and received prior to action or demand could not be recovered from him by the mortgagee. The former statute ⁴⁶² of limitations (21 Jacobus I, c. 16), did not, under the circumstances of such a possession by the mortgagor, run against the mortgagee." A possession that was rightful and not by wrong in its inception and continuance could not become tortious and adverse, except by some act on the part of the mortgagor which indicated a disavowal of the relation of mortgagor and mortgagee.

A tenant in possession, recognizing the title of his landlord by the payment of rent, does not acquire title by adverse possession, no matter how long his possession may continue. By a parity of reasoning, a mortgagor who is in possession of mort-

gaged premises by sufferance or by the acquiescence of the mortgagee, paying interest on a mortgage, is not in under a possession which is adverse. The principle that underlies the whole of this subject is that the payment of rent by the tenant, in one case, and the payment of interest by the mortgagor in the other case, is a recognition of the rights of the landlord or mortgagee. The possession of the mortgagor by the sufferance or forbearance of the mortgagee, making payments on account of the mortgage debt, does not become adverse to the title of the mortgagee until the mortgagor has ceased to recognize the mortgagee's title by the nonpayment of interest.

In *Blue v. Everett*, 56 N. J. Eq. 455, 39 Atl. 765, the mortgage in question was made July 19, 1872, securing the payment of a bond of the same date for fifteen hundred dollars payable in one year. As was decided in the court of chancery, the last payment of interest by the mortgagor was more than twenty years before bill filed. A subsequent payment of interest claimed by the mortgagee was disallowed for want of proof, and the decision of the vice-chancellor on that question was not set aside in this court. There being no recognized payment of interest within twenty years, the bar of the statute arising from the lapse of time after the right of entry accrued was not removed.

The decision in that case established the doctrine that the statute of limitations was available in a suit in equity for the foreclosure of a mortgage, as well as in an action of ejectment, and that the right to a foreclosure ceased when the legal right of entry upon the lands mortgaged was barred. In delivering ⁴⁶³ the opinion of the court the learned justice, speaking of the payments of interest by a mortgagee, used this language: "At law the bar of the statute [of limitations] could not be obviated by payments made on account of the debt, for the mortgagor does not hold the land under the mortgagee, and the payments could not be deemed rent or in any sense the price of possession, but would be referred solely to the personal obligation held by the mortgagee." This language does not accurately express the legal principle which controls when such a payment is made by the owner of the mortgaged premises in its effect upon the statute of limitations. The mortgagee has two securities for the debt—the bond and the legal estate in the mortgaged premises. A payment on the debt may be made by the obligor on the bond or by the grantee of the mortgaged premises. Where the obligor has conveyed the premises his grantee has no interest in keeping alive the contract to pay contained in the bond. A payment of interest or part principal on the debt may be made

by the obligor or by his grantee. If such payment be made by the owner, who was not the obligor, it would not at law remove the bar of the statute of limitations in an action against the latter. The possession upon which the statute attaches must be adverse. The mortgagee is not barred by the possession of his mortgagor paying interest: 3 Evans' Stat. 229, note; 4 Kent's Commentaries, 189. The doctrine of the law with respect to title under the statute of limitations is that there has been a possession adverse to the owner of the legal title for twenty years. Whether possession is adverse within the purview of the statute is a question of fact, to be determined upon competent evidence concerning the character of the possession, whether permissive or hostile to the title of the real owner. A person may be in possession of property for a period longer than that mentioned in the statute, without paying rent or making any compensation for his occupation of the premises, and not be within the statute of limitations. Possession, to make the statute available, must be adverse for the full period prescribed by the statute.

The bond which accompanied the mortgage was made by Dole. The payments made in 1876 were made by the Weehawken Ferry Company, which was then the owner of the mortgaged premises. ⁴⁶⁴ At that time an action on the bond had been barred by the discharge of Dole in bankruptcy. It is inconceivable that the ferry company should have made these payments with a view to appropriate them to an obligation on which the company was not liable, and that did not then exist, and not in satisfaction pro tanto of the mortgage, or in exoneration of the mortgaged premises. As was said by Vice-chancellor Stevens in this case: "In the case in hand the payments are necessarily referable to the mortgage." The indorsement of payments on the bond is a matter of form. Payments of interest, whether made on the bond or on the mortgage, if made by the holder of the title to the mortgaged premises, were in exoneration of the mortgaged premises from so much of the indebtedness, and were plainly a recognition of the lien of the mortgage. On a bill to foreclose such payments would be credited on account of the mortgage indebtedness, for the payment of which a sale of the mortgaged premises would be decreed. In an action of ejectment a mortgagor in possession for more than twenty years, setting up the statute of limitations, would be debarred of such defense by proof that within twenty years he had recognized the mortgaged estate by the payment of interest on the mortgage indebtedness. Under such circumstances his title would

not be adverse. The same principle must be applied in a suit in equity for the foreclosure of a mortgage.

The payment of interest by the Weehawken Ferry Company, the grantee in possession of the mortgaged premises, made on the 22d of December, 1876, is plenary evidence that up to that date the possession of the ferry company was not adverse to the mortgagee. When this payment was made the company was not holding adversely, and the twenty years, the period of adverse holding necessary to give title or to constitute a defense, either in an action of ejectment or in a foreclosure suit, had not elapsed when this bill was filed.

The question involved in this case is one of the utmost importance in this community. The moneyed institutions, controlling large amounts of capital, seek investments permanent as far as practicable. Such investments on mortgages are largely made in expectation that the money loaned will be neither paid ⁴⁶⁵ nor called in while the investment is satisfactory to both parties. A decision that would invalidate such mortgages of twenty years' standing, where the interest has been paid annually, would be disastrous.

The decree sustaining the complainant's right to a foreclosure should be affirmed.

The appeal by Colton presents the question of the rate of interest to be allowed. When the mortgage was given the legal rate of interest was six per cent. In 1866 the legal rate of interest was fixed at seven per cent, and that rate continued until 1878. On January 3, 1871, Dole, who was then president of the ferry company, made an indorsement on the bond as follows:

"In consideration of the extension of time of the payment of this bond it is understood and agreed that the rate of interest from this date shall be seven per cent.

"NATHANIEL DOLE. [Seal]"

This indorsement by the president of the company does not appear to have been made in a manner which would bind the company. The vice-chancellor allowed interest at the rate of six per cent disregarding the above agreement.

I shall vote to affirm the decree in both cases.

THE EFFECT OF THE STATUTE OF LIMITATIONS is to destroy the remedy, without impairing the right: Note to *Lamberton v. Grant*, 80 Am. St. Rep. 426.

LIMITATIONS.—HOW FAR EQUITY will follow the statute of limitations is discussed in the monographic note to *Frame v. Kenny*,

12 Am. Dec. 368-373. See, also, *Reynolds v. Sumner*, 126 Ill. 58, 9 Am. St. Rep. 523, 18 N. E. 334.

LIMITATIONS — MORTGAGE FORECLOSURE.—Though the note to secure which a mortgage was given is barred by the statute of limitations, the mortgage itself may be foreclosed: *Demuth v. Old Town Bank*, 85 Md. 315, 60 Am. St. Rep. 322, 37 Atl. 266. See, also, *Lewis v. Schwenn*, 93 Mo. 26, 3 Am. St. Rep. 511, 2 S. W. 391; *Townsend v. Tyndale*, 165 Mass. 293, 52 Am. St. Rep. 513, 43 N. E. 107. A mortgage is available until there has been ten years' adverse possession: *Lewis v. Schwenn*, 93 Mo. 26, 3 Am. St. Rep. 511, 2 S. W. 391.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

MANUFACTURING COMPANY v. HOBBS.

[128 N. C. 46, 38 S. E. 26.]

CONTRACTS—SALE OF UNCUT TIMBER—UNCERTAINTY.—A written contract, whereby the buyer is allowed five years within which to cut and remove standing timber, the term to be computed from the time the buyer begins to manufacture the timber into lumber, is void for uncertainty.

CONTRACTS—SALE OF TIMBER—REASONABLE TIME. Under a contract for the purchase of uncut timber, whereby a buyer is allowed a reasonable time to cut and remove it, a delay of thirteen years before any attempt to remove is made operates as a waiver of the purchaser's rights under the contract.

Shepherd & Shepherd and Pruden & Pruden, for the plaintiffs.

W. M. Bond and Charles Whedbee, for the defendants.

46 MONTGOMERY, J. It was admitted on the trial below that the logs belonged to the plaintiff, and that the plaintiff would be entitled to recover them if the contract, which was in writing, was sufficient and valid in law to convey them. The contract was entered into on the 26th of April, 1887, between Noah Hollowell and his wife and the plaintiff, and it was set forth therein that for the consideration of two hundred dollars, one-half to be paid on the execution and delivery and the other half to be paid in twelve months, Hollowell and wife **47** had sold and conveyed to the plaintiff "all the timber down to fourteen inches across the stump when cut on fifty acres of Hollowell's land." It was further stipulated in the contract that Hollowell was to pay all taxes, dues, assessments, etc., on the land and on the timber, and that there was allowed to the plaintiff "the full

term of five years within which to cut and remove the timber hereby conveyed, said term to commence from the time said party of the second part begins to manufacture said timber into wood or lumber."

The trial below was conducted altogether upon issues of fraud alleged to have been committed by the plaintiff on Hollowell and his wife in the treaty and the inducement leading up to the contract. The issues were found in favor of the defendants, and a judgment was entered for the value of the logs, the plaintiff having taken them into his possession. It was further adjudged that the contract between Hollowell and his wife and the plaintiff was void, and that the defendants are the owners of the timber trees standing on the land.

We are of the opinion that there is on the face of the pleadings an insuperable obstacle to a recovery on the part of the plaintiff, and that we ought, under section 957 of the code, to affirm the judgment of the court below: *Thornton v. Brady*, 100 N. C. 38, 5 S. E. 910; *Carter v. Rountree*, 109 N. C. 29, 13 S. E. 716. The matter to which we refer is that provision of the contract by which is granted the full term of five years within which to cut the timber, the term to commence from the time the plaintiff (party of the second part) begins to manufacture the timber into wood or lumber. We think that that feature of the contract renders the whole void. The contract may be treated as a lease, or a term for years, for a lease can be made of the right to cut trees or dig minerals. An indispensable legal requirement to the creation of a lease for a term of years is that it shall have a certain beginning and a certain ⁴⁸ end. Blackstone says that such an estate is frequently called a term, "terminus," because its duration or continuance is bounded, limited, and determined. If no time at which a lease is to commence has been mentioned, the law would fix that time as the date of the contract: *Moring v. Ward*, 50 N. C. 272; 2 Blackstone's Commentaries. But there is an attempt to fix the beginning of the lease in the contract before us. It is when the plaintiff shall begin to manufacture the timber into lumber. That act on the part of the plaintiff may never take place; it is entirely uncertain. The plaintiff cannot be made to commence to manufacture the timber into wood or lumber, and no rule can be thought of by which the commencement of the term can be fixed. It is evident from the reading of the contract that the fee in the land was not to pass, and yet no one can tell how long the land and the other timber upon it may remain useless to the

defendants and to the commonwealth under the indefinite and uncertain time at which the lease is to begin.

If the doctrine of reasonable time could be invoked in this case, the plaintiff would be in no better condition than he now occupies. The price was two hundred dollars for the timber, fourteen inches on the stump when cut, and the defendants to pay all taxes, and the contract made thirteen years ago, and not a stick of timber yet cut by the plaintiff. Under these circumstances, it would certainly be held as matter of law that the plaintiff had allowed a reasonable time to cut the timber to elapse, and, not having done so, its rights under the contract had been lost.

The judgment below is affirmed.

CONTRACT—CERTAINTY.—Every agreement required by the statute of frauds to be in writing must be certain in itself, or capable of being made so by reference to something else, whereby the terms can be ascertained with reasonable precision, or it cannot be carried into effect: *Abeel v. Radcliff*, 13 Johns. 297, 7 Am. Dec. 377.

TERRY v. ROBBINS.

[128 N. C. 140, 38 S. E. 470.]

CONTRACTS—MARRIED WOMEN—PRESUMPTION OF LAW OF SISTER STATE.—There being no evidence to the contrary, it is presumed that the contract of a married woman made in a sister state is void, as at common law.

NOVATION—CONTRACT—QUESTION FOR JURY.—Whether a bond given by a mortgagor in payment of an installment of interest is intended as a novation is a question of fact, to be determined by the jury.

Shepherd & Shepherd and Pruden & Pruden, for the plaintiff.

Busbee & Busbee, for the defendants.

141 MONTGOMERY, J. This action was for the foreclosure of a mortgage upon real estate executed by defendants Thomas H. Robbins and his wife to the plaintiff on the 15th of January, 1896, the plaintiff alleging that the first two payments of two thousand dollars each were past due and unpaid, and that according to the terms of the mortgage the whole debt was due.

The defendant averred in his answer, and introduced evidence on the trial to that effect, that the first note of two thousand dol-

lars had been paid, and that it was provided in the mortgage that upon the payment of that installment the plaintiff should execute to the defendant Robbins a release of a certain part of the land described in the mortgage, and that the plaintiff had refused to release the land, and that therefore the defendant had committed no breach of his contract in the nonpayment of the second installment.

The alleged payment of the first two thousand dollar installment was by the bond of the defendant Robbins, and his wife, the other defendant (she not having been a party to the original obligation), substituted for the first installment of two thousand dollars in full discharge and extinguishment thereof, the bond being delivered to the plaintiff and received by him in full satisfaction of the said installment. The bond was executed in New Jersey and was made payable in Keyport, in the same state. His honor was requested by the plaintiff to instruct the jury that if they believed the evidence in the case they should answer the sixth issue, "Has the defendant Robbins made default upon the mortgage set out in the complaint? Yes." The instruction was refused and the plaintiff excepted and appealed.

We think his honor committed no error in refusing to give ¹⁴² the instruction. As was contended by the plaintiff, that the addition of the wife's name to the new bond gave it no additional weight or worth, because it was void, so far as she was concerned. There was no evidence going to show that the common law had been changed or repealed in the state of New Jersey, as to the power of married women to make contracts, and the presumption therefore is that the common law prevailed in New Jersey at the time of the execution of the bond, and by the common law all such contracts by a feme covert were void: *Gooch v. Faucett*, 122 N. C. 270, 29 S. E. 362; *Griffin v. Carter*, 40 N. C. 413.

But the bond of Robbins was valid and binding on him, and whether or not there was a novation by the substitution of the bond for the installment under the mortgage was a question for the jury under proper instructions from the court. A prior existing debt can be extinguished by the acceptance of a promissory note or bond, if it is so intended by the parties, the only question being as to the proof of such intention. Generally, unless it is otherwise specially agreed, if the holder of a promissory note takes a new note for the original debt, that is *prima facie* a conditional payment only—that is, the original debt will be extinguished upon the payment of the substituted note. But Judge Story, in his work on Promissory Notes, section 401, says:

"Promissory notes either of the maker himself or of a third person, are often received by the holder or the creditor in payment of the original note or debt due by the maker. And the question often arises when and under what circumstances the receipt of a substituted note will be deemed a due and absolute extinguishment or satisfaction of the original debt or note, or not. In general, by our law, the receipt of a promissory note of the maker or of a third person will be deemed a conditional satisfaction or extinguishment only of the original debt or note of the maker (that is, if the substituted note is regularly ¹⁴³ paid), unless otherwise agreed between the parties. But if it is agreed between the parties, as it well may be, that the substituted note shall be an absolute payment of the original debt or note, then it will operate as an absolute satisfaction and extinguishment thereof": *Sheehy v. Mandeville*, 6 Cranch, 253, 264; 1 Jones on Mortgages, sec. 926.

There were other exceptions made to the charge of his honor, but they related to the question we have just discussed, and need no further consideration. The defendants' objections to the evidence were properly overruled. The motion for a new trial because of evidence discovered since the trial of the case is refused.

No error.

LAW OF SISTER STATE.—IT IS PRESUMED that the common law prevails in a sister state: *Burdiet v. Missouri Pac. Ry. Co.*, 123 Mo. 221, 45 Am. St. Rep. 528, 27 S. W. 453; and there is no presumption that its statutes are like those of this state: *Kelley v. Kelley*, 161 Mass. 111, 42 Am. St. Rep. 389, 36 N. E. 837. Contra, *Chapman v. Brewer*, 43 Neb. 890, 47 Am. St. Rep. 779, 62 N. W. 320; *Cavallaro v. Texas etc. Ry. Co.*, 110 Cal. 348, 52 Am. St. Rep. 94, 42 Pac. 918.

NOVATION.—WHETHER A TRANSACTION AMOUNTS to a novation is a question of intention, to be decided from all the circumstances of the case: *Fidelity Ins. etc. Co. v. Shenandoah Valley R. R. Co.*, 86 Va. 1, 19 Am. St. Rep. 858, 9 S. E. 759.

SETZER v. SETZER.

[128 N. C. 170, 38 S. E. 731.]

DIVORCE—CRUELTY—ABANDONMENT.—Where a husband is compelled to leave and live separate from his wife on account of her cruelty and misconduct, he is entitled to an absolute divorce.

DIVORCE—RECRIMINATION—ADULTERY AFTER ABANDONMENT.—When a husband is compelled to leave, and live separate from, his wife on account of her cruelty, it is no defense to an action by him for divorce that he committed adultery after the separation.

DIVORCE—ADULTERY.—Under the statute of North Carolina, the adultery of a husband is not a cause for divorce, unless he separates from his wife and lives in adultery.

Self & Whitener, for the plaintiff.

L. L. Witherspoon, for the defendant.

¹⁷¹ **COOK, J.** The object of this suit is to dissolve the bond of matrimony existing between the plaintiff and defendant. Upon the finding by the jury of the issues, his honor granted a decree of divorce a mensa et thoro, to which the plaintiff excepted. The question thus presented for our decision is, whether his honor erred in not granting a decree of divorce a vinculo matrimonii, as prayed for.

The relief sought is based upon the ground of abandonment, under section 1285 of the code, as amended by chapter 277 of the acts of 1895, and chapter 211 of the acts of 1899. The issues as found establish the marriage, residence, etc., and that "the plaintiff left his home where the defendant resided more than twelve months before the commencement of this action, and before the 1st of January, 1899." The eighth issue, "Was plaintiff compelled to leave defendant and live separate from her on account of the cruel treatment and misconduct of defendant to plaintiff?" was also found in the affirmative.

Upon this verdict, it is clear to the court that the plaintiff was entitled to a decree of dissolution of the bonds, pursuant to said act of 1895, and that the court below erred in rendering the decree, set out in the record, for divorce from bed and board. The grounds upon which the statute authorizes the dissolution is the abandonment by the wife and living separate and apart from her husband. The method or manner ¹⁷² by which the abandonment was obtained is not material. Whether she left him, or

forced him to unwillingly leave her, is to the same effect and accomplishes the same purpose. Should the husband have driven his wife from his house, or obtained her removal by stratagem, or have withheld from her a support while there, he would have been deemed to have abandoned her: 1 Bishop on Marriage, Divorce, and Separation, sec. 1711; High v. Bailey, 107 N. C. 70, 12 S. E. 45. But "abandonment" is not a complete cause for divorce, nor is "living separate and apart." Both must exist at the same time to constitute a cause of action. In this case it was the wife who, by her cruelty and misconduct, compelled the husband to leave and live separate and apart from her, which entitled him to the relief sought.

However, in bar of his action, she contends that he is not entitled to a decree, because he is in *pari delicto*, in that he has committed acts of adultery "after the separation"; and it is found by the jury in answer to the sixteenth issue. It is not charged that any infidelity existed upon his part until after he was driven away, notwithstanding the facts as found by the jury that she had refused him bed and cohabitation since the year 1890. This defense as thus established is unsound. In the case of Foy v. Foy, 35 N. C. 90, it is held (Pearson, J., delivering the opinion): "If a wife leave a husband and refuse to live with him without sufficient cause, and he afterward lives in adultery, there is no cause for divorce; for the consequence may be ascribed to her prior violation of the duty of a wife. No one should be allowed to take advantage of his own wrong." To the like effect are Whittington v. Whittington, 19 N. C. 64, and numerous other cases in our reports. So that she could not be considered the injured, but the injuring party, and, being the cause of the wrong, would not be allowed a decree in her favor. To sustain this defense, in ¹⁷³ bar, she must show a separate and distinct offense against the marriage relation, as established by law, which would be a cause for divorce. It must be such as would entitle her to a decree of divorce in an action against the plaintiff: Nelson on Divorce and Separation, secs. 433, 434; 2 Bishop on Marriage, Divorce, and Separation, sec. 381. This she has not done. Under our statutes adultery alone, committed by the husband, is not a cause. He must separate from his wife "and live in adultery" (Code, sec. 1285, subsec.1), neither of which is shown by the defendant.

The exceptions of the plaintiff are sustained and the judgment rendered in the court below must be stricken out, and a decree for divorce from the bonds of matrimony be entered in conformity with the statute and the verdict of the jury.

Error.

DIVORCE—ADULTERY.—Under a statute allowing a divorce only to a party "injured," the adultery of a wife, committed after a separation caused by the default of her husband, will not avail him to dissolve the bonds of matrimony: *Tew v. Tew*, 80 N. C. 316, 30 Am. Rep. 84. But in *Dupont v. Dupont*, 10 Iowa, 112, 74 Am. Dec. 378, it is held that a wife is entitled to a divorce, where she deserts her husband without reasonable cause, but her conduct during the separation is above reproach, while he during that time is guilty of open and notorious adultery.

DUNHAM v. ANDERS.

[128 N. C. 207, 38 S. E. 832.]

CONSTITUTIONAL LAW—VESTED RIGHT TO A PENALTY.—A plaintiff who has obtained judgment for a penalty in a justice's court, and which, though appealed from, remains unreversed, acquires a vested right of property which cannot be taken from him by the legislature.

R. S. White and Lewis & Schulken, for the plaintiff.

James H. Pou and C. C. Lyon, for the defendant.

210 DOUGLAS, J. The only point presented for our consideration is whether a plaintiff can by a justice's judgment, remaining unreversed, acquire such a vested right in the penalty as cannot be taken from him by the legislature.

Cooley in his work on Constitutional Limitations, says at page 443: "So, as before stated, a penalty given by statute may be taken away by statute at any time before judgment is recovered." But the same distinguished author says at page 443: "But a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference."

In the recent case of *Dyer v. Ellington*, 126 N. C. 941, 36 S. E. 177, this court says on page 944 (126 N. C., 36 S. E. 178): "An informer has no natural right to the penalty, but only such right as is given to him by the strict letter of the statute. It is not such a right as is intended to be protected by the act, but is one created by the act. He has, in a certain sense, an inchoate right when he brings his suit—that is, the bringing of the suit designates him as the man thereafter exclusively entitled to sue for that particular penalty; but he has no vested right to the penalty until judgment. Until it becomes vested, we think it can be destroyed by the legislature. If the penalty had been reduced to judgment, or had been given to the in-

jured party in the nature of liquidated damages, the case would be essentially different."

211 In that case the act of remission was passed while the action was pending in the justice's court, and before judgment. In the case at bar, the act was passed after judgment in the justice's court, and while the action was pending on appeal in the superior court. Upon the trial in the latter court, all the issues involved in the case before the magistrate were found for the plaintiff. It thus appears that no error was found in the justice's judgment, which neither was, nor could have been, reversed upon its original merits. It therefore stands in full force and effect, subject only to the plea in bar of the remitting statute, upon which alone the judge below based his judgment in favor of the defendant.

This brings us to the consideration of the nature of a judgment obtained before a justice of the peace, and the effect thereon of an appeal to the superior court. If such a judgment is a final judgment—that is, a judgment finally disposing of the subject matter of the action, subject only to reversal on appeal, and remains in full force and effect until such reversal, notwithstanding the mere fact of appeal—then, in our opinion, it becomes a vested right of property in the plaintiff that cannot be divested except by a reversal on its original merits. In other words, the plaintiff cannot be divested of his property therein by merely legislative action.

Of course, if the plaintiff had failed to recover before the justice of the peace, and had himself appealed, he would have had no vested right, as he would have had no judgment to which such a right could attach. He would have only a qualified right of action, exclusive as far as the particular penalty is concerned, but subject to loss by legislative interference. A judgment of a justice of the peace is a final judgment when it fully disposes of the subject matter of the action, since, unless reversed on appeal, it finally determines the rights of the parties. An appeal to the superior court does not vacate the judgment, nor even suspend its operation: **212** Code, sec. 875. It is true the appellant may obtain a stay of execution of the judgment by giving an undertaking to secure the full amount of the judgment, together with all costs, as provided by sections 882, 883, 884, and 885 of the code; but the judgment otherwise remains in full force and effect, even retaining its lien on real estate when properly docketed, which is one of the highest attributes of a judgment. While the trial on appeal in the superior court is de novo, yet the judgment appealed from remains in force until re-

versed or modified by a judgment of the superior court: *Hiatt v. Simpson*, 35 N. C. 72, 74; *Whitehurst v. Merchants' etc. Transp. Co.*, 109 N. C. 342, 344, 13 S. E. 937. In *Dysart v. Brandreth*, 118 N. C. 968, 973, 33 S. E. 966, 967, this court says: "A justice's judgment, when duly docketed in the office of the clerk of the superior court, becomes a judgment of the superior court to all intents and purposes": Citing *Cannon v. Parker*, 81 N. C. 320; *Adams v. Guy*, 106 N. C. 275, 11 S. E. 535. "And it becomes a lien on all the real estate of the defendant in the county where it is docketed, which continues for ten years from the date of docketing": Citing *Cannon v. Parker*, 81 N. C. 320; *Murchison v. Williams*, 71 N. C. 135. "The fact that defendant appealed from the judgment of the justice of the peace, and gave security to stay execution, did not deprive the plaintiff of the right to have the judgment docketed, nor did it take away the lien of the judgment."

The defendant's counsel cited some authorities in other jurisdictions to the effect that the legislative authority may, by repealing a law imposing a penalty pending an appeal from a judgment therefor, defeat the judgment, or, after judgment and before execution, defeat the execution. All such cases appear to have been decided upon particular facts or principles not applicable to the case at bar; as, for instance, (a) the construction of local statutes; (b) where the national or state government itself prosecuted the action with only a ²¹³ contingent interest going to the informer; (c) where the effect of the appeal was to vacate or completely suspend the judgment.

That such is not the general effect of an appeal is shown by *Black on Judgments*, where the learned author says, in section 522: "The judgment of a justice of the peace or other inferior tribunal (in a case where jurisdiction of the parties and subject matter appears from the face of the proceedings) so long as it remains unreversed, is, for every purpose, as binding and conclusive between the parties as that of the highest court of record in the state." *Freeman on Judgments* says, in section 524: "Where a court of special jurisdiction, having authority to decide the matter in controversy, acquires jurisdiction over the parties to the suit, its judgment is final and conclusive unless reversed by some appellate court."

The case at bar is the counterpart of *Dyer v. Ellington*, 126 N. C. 941, 36 S. E. 177, inasmuch as the act pleaded in bar was passed after judgment was rendered in the justice's court. We are, therefore, of opinion that when the plaintiff obtained judgment for the penalty before the justice of the peace, he ac-

quired a vested right of property that could be divested only by judicial, and not by legislative, proceedings.

On the issues found in the superior court, judgment should have been rendered for the plaintiff, and its judgment is, therefore, reversed.

PENALTY.—VESTED RIGHTS OF INFORMERS in penalties are discussed in the monographic note to *Omaha etc. Ry. Co. v. Hale*, 50 Am. St. Rep. 560.

MARTIN v. HIGHLAND PARK MANUFACTURING CO.

[128 N. C. 264, 38 S. E. 876.]

MASTER AND SERVANT—IMPERFECT TOOLS.—A master is not liable for an injury to his servant due to imperfections in small and common tools in every-day use, such as a hammer.

CONTRIBUTORY NEGLIGENCE PRESUPPOSES NEGLIGENCE, and can exist only as a co-ordinate or counterpart.

MASTER AND SERVANT—INJURY FROM DOING WORK OUTSIDE OF EMPLOYMENT.—A master is not liable to his servant for an injury caused by doing work outside of the scope of his employment at the request of another servant made without authority.

MASTER AND SERVANT—DANGEROUS WORK OUTSIDE OF EMPLOYMENT.—A master is not liable for an injury to his servant caused by his being ordered to do dangerous work outside of the scope of his employment, unless such work was more dangerous and complicated than that in which he was engaged.

Osborne, Maxwell & Keerans, for the plaintiff.

Jones & Tillett and Burwell, Walker & Cansler, for the defendant.

²⁶⁴ **COOK, J.** We find no error in the ruling of his honor in sustaining the motion of the defendant to dismiss the action, as in case of nonsuit, upon demurrer to plaintiff's evidence. The evidence does not show negligence by defendant or its agent. In endeavoring to put a new "key" in the shaft, in place of the worn or defective one, Webb, the loom-fixer, found it difficult to insert the new one without help. That it did not fit easily was hardly to be expected, from the ²⁶⁵ fact that its proper use required a tight fit in order to do the work properly. The one taken out was working loosely, and for that reason plaintiff called his attention to it. In inserting the new key the

loom-fixer called upon plaintiff, a weaver whose loom had thus gotten out of fix, to hold the hammer upon the key while he, Webb, struck upon that hammer with another, in order to drive the key into the shaft, and while so striking a fragment of steel flew off and struck him in the eye, causing the injury for which he brings this action.

Plaintiff's expert witness testifies that the key ought to have been driven in by slight taps from the hammer, but it wasn't. The fact appears that it required heavier blows. But as plaintiff was not injured by the key, he cannot maintain his contention that he was injured by its defective formation or excessive size. But he says he was injured by a piece of steel from the face of the hammer. Well, then, if defendant furnished its employés with tools known to it to be defective, or by ordinary care and inspection could have known of such defects, and the injury was caused by reason of such defects, then there would have been evidence of negligence to be submitted to the jury.

But was there any apparent defect in the hammer? Or was there a defect known to the defendant or its agent? Or was the hammer used in a negligent, careless, and unworkmanlike manner? If such state of facts existed, the plaintiff failed to offer any evidence to prove it.

There is no complication about a hammer; it is not a piece of machinery which requires any attention whatsoever to keep in order; it cannot get "out of fix," unless the handle breaks; it requires neither art, science, nor skill in its use; brawn and muscle do the work, and it is known to be one of the most harmless of all tools to the person using it. Should a flaw or other patent defect exist, it would more certainly appear to the person undertaking to work with it, whose duty it would be to make it known to his employer. Should a latent defect ²⁶⁰ exist, it could not be known by the closest inspection either to employer or employé, and for injury on that account legal responsibility would rest upon no one, and would be the misfortune of the sufferer. Whether properly tempered can only be ascertained by its use, and not by inspection. Whether the dents were made by the use at the time of the injury, or resulted from long and violent service, does not appear, nor do they seem to have been discovered until after the injury occurred.

Surely, it cannot be seriously contended that every employer is responsible for injuries occurring from improperly tempered axes, hoes, scythes, trace-chains, lap-links, bridle-bits, etc., the imperfections of which could not be known till used; or for defective whiffle-trees, ax-helves, hoe-helves, hand-spikes, plow-

lines, and such like (the defects of which would be first discovered by the party using them), unless the employer is shown to have had knowledge of such defects. If such be the rules of law, then the contentment of the farmer must give place to anxiety and dread lest injury, resulting to a servant from a splintered hoe-helve or hand-spike, defective bridle-bit, whiffle-tree, or plow-line, et id simile, may at any time occur, and sweep from him his farm and belongings in compensation of the damage done. To the same experience would the contractor expect to be subjected should a defective nail, while being driven by one of his carpenters, break and do injury. To which doctrine we cannot subscribe.

Injuries resulting from events taking place without one's foresight or expectation, or an event which proceeds from an unknown cause, or is an unusual effect of a known cause and therefore not expected, must be borne by the unfortunate sufferer, which seems to us to be the condition of the plaintiff in this case. For an injury caused by an inevitable or unavoidable accident while engaged in a lawful business, there ²⁶⁷ is no legal liability: Black's Law and Practice in Accident Cases, sec. 8.

In *Mulligan v. Crimmins*, 75 Hun, 578, 27 N. Y. Supp. 819, it is held, where a piece of metal (spicula) was forced from a chisel by a blow of a heavy sledge and struck plaintiff in the eye, putting it out, does not raise a presumption of negligence in the absence of proof that the chisel, before the blow was struck, was in a dangerous condition, still less that a reasonable examination would have disclosed the danger.

In *Georgia R. R. & B. Co. v. Nelms*, 83 Ga. 70, 20 Am. St. Rep. 308, 9 S. E. 1049, where the injury was caused by the breaking of a hammer, it was held that the hammer appearing to be first-class, the plaintiff could not recover for injury caused by some latent defect. To the same effect is the case of *Carlson v. Phoenix etc. Co.*, 132 N. Y. 273, 30 N. E. 750.

In *Wachsmuth v. Shaw Electric Crane Co.*, 118 Mich. 275, 76 N. W. 497, where a chip from a snap-hammer struck plaintiff and injured him, it is held that the duty of inspection by the master of appliances used by servants does not extend to small and common tools in every-day use; of the fitness of such for use the servants using them may reasonably be supposed to be better judges than the master. To the same effect is *Hopkins Bridge Co. v. Burnett*, 85 Tex. 16, 19 S. W. 886, and other cases cited by defendant's counsel in their brief.

In the case at bar there is no evidence that any defect in the hammer was known to exist either by the plaintiff or defend-

ant, nor is there any evidence to show that its condition was such as to incite an inquiry or suspicion.

No negligence in inflicting the injury appearing upon the part of the defendant, the defense of contributory negligence does not require our consideration. Contributory negligence presupposes negligence, and can exist only as a co-ordinate or counterpart. When the defendant has exercised every possible care and caution, negligence fails to exist, and an injury ²⁶⁸ resulting, it must occur only by the negligence of the plaintiff, which cannot be considered contributory but original negligence. We then come to consider the third contention of the plaintiff—that his injury was caused by being ordered to do dangerous work outside of the scope of his employment. It appears that plaintiff was not employed by Webb, the loom-fixer, but by the superintendent, whose duty it was to employ help and discharge it. The loom fixer's business was to fix looms when they got out of order and see that the weavers kept at work, and not to employ or discharge. Before calling upon plaintiff, Webb had secured the assistance of one Little, but he left and returned to his work; then plaintiff was called upon. To assist the loom-fixer was not within the scope of his employment, and he knew that Webb had no authority to put him to doing any work other than that of weaving. Under this state of facts, as appears from plaintiff's testimony, Webb did not stand in the place of the master, but, if it had been otherwise, the defendant would not be liable unless the outside work was more dangerous and complicated for the plaintiff to perform than that in which he was engaged. "The liability upon the master in cases of injury to a servant received in a dangerous employment outside of that from which he is engaged, arises not from the direction of the master to the servant to depart from the one service and engage in the other more dangerous work, but from failure to give proper warning of the attendant danger in cases where the danger is not obvious, or where the servant is of immature years and unable to comprehend the danger": 2 Bailey's Personal Injuries Relating to Master and Servant, sec. 3462a; *Cole v. Chicago etc. Ry. Co.*, 71 Wis. 114, 5 Am. St. Rep. 201, 37 N. W. 84.

In the case at bar there is no evidence to show that there was less risk and danger in weaving than in holding the hammer for Webb to strike, nor was there any evidence to ²⁶⁹ show a latent defect in the hammer which was known to Webb or the master, or by reasonable diligence could have been discovered. There being no such evidence, his honor properly sustained the demurrer and nonsuited the plaintiff.

No error.

MASTER AND SERVANT—DEFECTIVE TOOLS.—A hammer is not machinery in its most comprehensive sense, or within the meaning of a statute creating a presumption that one injured by the machinery of a railway company was injured through its want of care and diligence: *Georgia R. R. etc. Co. v. Nelms*, 83 Ga. 70, 20 Am. St. Rep. 308, 9 S. E. 1049.

THE LIABILITY OF A MASTER TO HIS SERVANT, when outside of his ordinary employment, is discussed in *Cole v. Chicago etc. Ry. Co.*, 71 Wis. 114, 5 Am. St. Rep. 201, 37 N. W. 84; *Kennedy v. Chase*, 119 Cal. 637, 63 Am. St. Rep. 153, 52 Pac. 33.

GWYN HARPER MANUFACTURING COMPANY v. CAROLINA CENTRAL RAILROAD.

[128 N. C. 280, 38 S. E. 894.]

CARRIERS—EVIDENCE—DELIVERY OF GOODS.—In an action against a connecting carrier for the value of goods lost in transit, evidence that the shipper actually delivered the goods to the carrier is material and relevant.

CARRIERS—NOTICE OF LOSS.—RESTRICTIONS in a contract of carriage of the time within which notice of loss must be given will be sustained, if reasonable.

CARRIERS—NOTICE OF LOSS—UNREASONABLE RESTRICTION.—A stipulation in a contract of carriage that claims for loss of goods must be made within thirty days after delivery, or after due time for delivery, is unreasonable, and will not be enforced.

CARRIERS—NOTICE—CONNECTING CARRIER.—WHERE A BILL OF LADING expressly requires that notice of loss must be given to the agent at the point of delivery, an intermediate carrier who is sued cannot complain that no notice of the loss was given to it, especially where it had full knowledge thereof.

CARRIERS—CONNECTING—PRESUMPTION OF LOSS. Among connecting lines of common carriers, that one in whose hands goods are found damaged is presumed to have caused the damage, and the burden is upon it to rebut the presumption.

TRIAL—DIRECTING VERDICT.—Where a defendant denies every allegation of a complaint, the burden of proof is cast upon the plaintiff, and the court cannot direct a verdict in favor of the plaintiff, without at least leaving to the jury the credibility of the testimony.

S. G. Finley, for the plaintiff.

D. W. Robinson, for the defendant.

²⁸¹ DOUGLAS, J. This is an action for the recovery of twenty bags of flour lost in transit. The plaintiff alleges in his

complaint, which is apparently sustained by the evidence, that it is the assignee of the bill of lading for a large amount of flour shipped from Circleville, Ohio, to J. A. Durham & Co., Lenoir, North Carolina, all of which was delivered except the twenty bags said to have been lost. The answer denied every allegation of the complaint, either directly or for want of knowledge. As an additional defense, the answer alleged: "That no claim for loss or damage was made by plaintiff above named within thirty days after the delivery of the property, or within thirty days from the discovery of the loss, as set forth and required in the bill of lading and contract under 282 which the said property and flour were shipped." The assignments of error were to the admission of evidence, to the submission of issues, and the direction of the verdict in favor of the plaintiff. The following is the statement in the record as to the issues: "The defendant tendered the following issues, which were refused by the court, to wit: 1. Were the goods of plaintiff lost while in the custody of defendant? 2. What is the value of the same? In place of the issues tendered by defendant, plaintiff tendered the following issues, which his honor answered—the issues and answer are: "Are the defendants indebted to the plaintiff? If so, how much? Answer: Thirty-eight dollars and fifty cents."

We see no error in the admission of exhibits "A," "B," "C," and "D," which were properly identified, and appear to be part of the records of one or the other of the different companies composing the through freight line. Exhibits "A," "B," and "C" seem to be official reports of officers of the companies directly relating to the subject matter of the action; while exhibit "D" is the claim of loss filed by the plaintiff as required by the bill of lading. The papers are certainly relevant and material, and we think are equally competent. The same may be said of the depositions of the witnesses Crites and Kyle. In an action for the value of goods lost in transit, it is sometimes difficult to comprehend how the testimony of the shipper that he actually delivered the goods to the common carrier can be considered "incompetent and irrelevant." The defendant contends that the plaintiff is barred of any recovery on account of the following clause in the bill of lading, to wit: "Claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event."

283 It is now well settled that all such contracts of limitation, being in derogation of common law, are strictly construed, and never enforced unless shown to be reasonable: *Mitchell v. Carolina Central R. R. Co.*, 124 N. C. 236, 32 S. E. 671; *Henkle v. Southern Ry. Co.*, 126 N. C. 932, 78 Am. St. Rep. 685, 36 S. E. 348, and cases therein cited. This court has said in *Wood v. Southern Ry. Co.*, 118 N. C. 1056, 24 S. E. 704, that "such stipulations, contained in a contract, are a part of the contract, but they do not contain any part of the obligation of the contract. They are conditions, in the nature of estoppels, and, when enforced, operate to prevent the enforcement of the obligations of the contracts. Such restrictions, when reasonable, will be sustained. But as they are restrictions of common-law rights and common-law obligations of common carriers, they are not favored by the law."

We do not think the stipulation under consideration is reasonable, and therefore it cannot be enforced. We deem it proper to state that we are inclined to think that, in analogy to the ruling as to telegraph and express companies, a stipulation requiring a demand to be made within sixty days after notice of loss or damage would be reasonable: *Sherrill v. Western Union Tel. Co.*, 109 N. C. 527, 14 S. E. 4; *Lewis v. Western Union Tel. Co.*, 117 N. C. 436, 23 S. E. 319; *Dixie Cigar Co. v. Southern Exp. Co.*, 120 N. C. 348, 27 S. E. 73, 58 Am. St. Rep. 795; *United States Watch Case Co. v. Southern Exp. Co.*, 120 N. C. 351, 27 S. E. 74. That this defense in the present instance is purely technical is shown by the testimony of the witness Holland, formerly the defendant's agent at Lincolnton, who testified that he checked the flour short when delivered to Chester and Lenoir Railroad, and also by exhibit "B." It would thus appear that the defendant knew of the loss before the consignee.

Again, the defendant complains that the notice was given to the Chester and Lenoir Railroad, and not to the defendant, who alone is sued. The bill of lading, in express terms, requires that such notice should be given "to the agent at point of delivery," which in this case was Lenoir. Where it is **284** shown by its own way-bills that the defendant had full knowledge of the loss before any part of the shipment reached its destination, it is doubtful whether any formal notice should be required of the consignee; but that question is not necessary for us now to decide.

This court has repeatedly held that "among connecting lines of common carriers, that one in whose hands goods are found damaged is presumed to have caused the damage, and the bur-

den is upon it to rebut the presumption": *Morganton Mfg. Co. v. Ohio River etc. Ry. Co.*, 121 N. C. 514, 61 Am. St. Rep. 679, 28 S. E. 474; *Mitchell v. Carolina Cent. R. R. Co.*, 124 N. C. 236, 32 S. E. 671; *Hinkle v. Southern Ry. Co.*, 126 N. C. 932, 78 Am. St. Rep. 685, 36 S. E. 348.

We think that the same rule holds good where only a part of the shipment is lost, because that is the nature of the damage to the shipment, and the carrier in whose hands the remainder is found is fully as able to protect itself as it would be in the case of breakage or other damage. Whether this rule would apply where no part of the shipment is found in anybody's hands may be a different question. That is not now before us. While the plaintiff might have sued the Chester and Lenoir road, which delivered to it the remainder of the shipment, we do not think that it is compelled to do so when its own testimony tends to prove that no part of the lost flour ever came into the possession of that road.

Under the circumstances, we do not think that the form of the issues was material. The evidence tended to show that the lost flour was received by the defendant and not delivered either to the plaintiff or the Chester and Lenoir Railroad. If the jury believed the evidence, they would, in all probability, have found for the plaintiff under either set of issues.

This brings us to the direction of the verdict, the exception to which must be sustained. The defendant denied every allegation of the complaint, thus casting the burden of proof upon the plaintiff. Therefore, there was error committed by his honor in directing a verdict in favor of the plaintiff without ²⁸⁵ at least leaving to the jury the credibility of the testimony. That the court cannot thus direct an affirmative finding of fact is well settled: *Anniston Nat. Bank v. School Committee*, 121 N. C. 109, 28 S. E. 134; *White v. Suffolk etc. R. R. Co.*, 121 N. C. 484, 489, 27 S. E. 1002; *Wood v. Bartholomew*, 122 N. C. 177, 29 S. E. 959; *Crews v. Cantwell*, 125 N. C. 516, 519, 34 S. E. 688; *Porter v. White*, 127 N. C. 73, 37 S. E. 88; *Spruill v. Northwestern Mut. Life Ins. Co.*, 120 N. C. 141, 27 S. E. 39; *Collins v. Swanson*, 121 N. C. 67, 28 S. E. 65; *Eller v. Church*, 121 N. C. 269, 28 S. E. 363; *Cable v. Southern Ry. Co.*, 122 N. C. 892, 29 S. E. 377; *Cox v. Norfolk etc. R. R. Co.*, 123 N. C. 604, 31 S. E. 848.

It is simple justice to the judge who tried the case in the court below to say that we doubt whether he has not been inadvertently misquoted in the statement of the case. The statement says that "his honor answered" the issues but the defend-

ant's third assignment of error says that "his honor erred in instructing the jury, in holding and directing the answer to the issue submitted"; while the brief of the plaintiff's counsel says, "his honor was warranted in instructing the jury that, if they believed the evidence, they would answer the issue thirty-eight dollars and fifty cents." However this may be, we are bound by the record, and must order a new trial for the error therein appearing.

CARRIER.—A STIPULATION IN A BILL OF LADING that the carrier shall not be liable for loss or damage, unless the claim therefor is presented within thirty days after the date of such bill, is unreasonable and void: *Dixie Cigar Co. v. Southern Exp. Co.*, 120 N. C. 348, 58 Am. St. Rep. 795, 27 S. E. 73.

A CONNECTING CARRIER IS ENTITLED TO THE BENEFIT OF LIMITATIONS on the carrier's liability contained in the contract between the initial carrier and the shipper: *Note to Bird v. Railroads*, 63 Am. St. Rep. 861.

OF CONNECTING CARRIERS, THE ONE IN WHOSE HANDS goods are found injured is presumed to have caused the damage: *Hinkle v. Southern Ry. Co.*, 126 N. C. 932, 78 Am. St. Rep. 685, 36 S. E. 348.

MARTIN v. BUFFALOE.

[128 N. C. 305, 38 S. E. 902.]

SHERIFFS—LIABILITY FOR TRESPASS—OFFICIAL, AND INDEMNITY BONDS.—When a sheriff has committed a trespass in seizing property not subject to his process, the claimant may proceed either against him and his sureties on his official bond, or against the obligors on his bond of indemnity.

SHERIFFS—TRESPASS—LIABILITY OF BONDSMEN. The liability of the signers of a sheriff's indemnity bond to him whose property has been wrongfully seized is in tort, by reason of their being cotrespassers with the sheriff.

SHERIFFS—SURETIES ON BOND—RELEASE.—A sheriff cannot release the sureties on his indemnity bond from liability to one whose property has been wrongfully seized.

SHERIFFS—WRITTEN NOTICE TO BONDSMEN.—A notice given by the sheriff to the sureties on his indemnity bond that he has been sued is not a judicial notice, and therefore does not need to be in writing.

TRESPASS—JOINT.—AN UNSATISFIED JUDGMENT AGAINST ONE TRESPASSER is no bar to a suit against another for the same trespass.

ASSIGNMENT FOR BENEFIT OF CREDITORS—SCHEDULE OF PREFERRED DEBTS.—An assignment for the benefit of creditors is void, where the schedule of preferred debts is affirmed before a justice of the peace who is one of the trustees in the assignment.

RES JUDICATA—ACTION AGAINST COTRESPASSER.

A point decided in an action against one trespasser is not *res judicata* in an action against a cotrespasser.

SURETIES—JUDGMENT AGAINST PRINCIPAL AS EVIDENCE—TORT.—The rule that a judgment against a principal in an official or fiduciary bond is presumptive evidence against the sureties does not apply where the action is not on the bond, but in tort.

Day & Bell and Alexander Stronach, for the plaintiffs.

R. B. Peebles, for the defendants.

306 CLARK, J. The principle applying to actions against obligors upon indemnifying bonds is thus stated in *Murfree on Sheriffs*, section 634: "The general rule is that when a sheriff has committed a trespass in seizing property not subject to **307** his process the claimant may proceed against him and his sureties on his official bond, or against the obligors on his bond of indemnity, if he has taken one, the latter being regarded as a cumulative security and the plaintiff (in the execution) and his sureties having rendered themselves liable as cotrespasgers by its execution. . . . The claimant may, at his election, proceed against the sheriff and his sureties on his official bond, or bring suit against him and the obligors in his indemnity bond, who can properly be made defendants, because by the execution of the bond they ratify the acts of the sheriff and become joint wrongdoers with the officer. It is well settled that all persons who contribute to the commission of a trespass, or after the same has been committed for their benefit assent to it, are responsible as principals and each liable to the extent of the injury. Hence the obligor in an indemnity bond may be held a cotrespasser with the officer who acted under it." The authorities cited in the notes thereto sustain the proposition that the liability of the signers of the indemnity bond to the sheriff is, by virtue of the contract of indemnity, but their liability to him whose property is wrongfully sold is in tort, by reason of their being cotrespasgers with the sheriff: *Leshar v. Gatman*, 30 Minn. 328, 15 N. W. 309; *Davis v. Newkirk*, 5 Denio, 92; *Herring v. Hoppock*, 15 N. Y. 409; *Knight v. Nelson*, 117 Mass. 458; *Screws v. Watson*, 48 Ala. 628; *Lewis v. Johns*, 34 Cal. 629; *Lovejoy v. Murray*, 3 Wall. 1; *Luebbering v. Oberkoetter*, 1 Mo. App. 393; *Allred v. Bray*, 41 Mo. 487, 97 Am. Dec. 283; and there are many others.

The sureties on the indemnity bond being liable as cotrespasgers, the sheriff could not by a covenant not to sue exempt any one of them from liability to the plaintiffs. He could only

release them from liability on their contract of indemnity to himself.

The question of liability for personal property exemption ³⁰⁸ does not arise, as the plaintiffs seek payment only for the goods actually sold.

"When a statute requires notice to be given, it must be in writing, etc., and served in the manner required by the code, section 597": *Allen v. Strickland*, 100 N. C. 225, 6 S. E. 780; *Turner v. Holden*, 109 N. C. 182, 13 S. E. 731. But that has no application to the notification given by the sheriff to the surety on the bond of indemnity that he (the sheriff) has been sued. This is not a judicial notice required by any statute, and, therefore, required to be in writing and served by an officer, but it is a notification—a conveyance of information—which could be made orally, or by mail, or in any other method that would give to the surety the knowledge that the officer is sued: *Robbins v. Chicago*, 4 Wall. 657. This would be true even in an action by the sheriff on the indemnity bond, and in any event it does not affect the plaintiffs, who, having sued one trespasser and recovered nothing by execution, are not estopped from suing the others because they might have had no notice of the first action. A judgment against one trespasser is no bar to a suit against another for the same trespass. Nothing short of the satisfaction of the judgment can have that effect: *Lovejoy v. Murray*, 3 Wall. 1; *Elliott v. Hayden*, 104 Mass. 180.

The defendants insist, however, that there was error in the instruction to the jury that if they believe the evidence to answer the issue "Yes," because it appears in evidence that the schedule of preferred debts was affirmed to before B. F. Martin, a justice of the peace, who was one of the trustees in the assignment: *Long v. Crews*, 113 N. C. 257, 18 S. E. 499; *Blanton v. Bostic*, 126 N. C. 418, 35 S. E. 1035; *McAllister v. Purcell*, 124 N. C. 262, 32 S. E. 715. That being invalid, the assignment under which plaintiffs claim was void: *National Bank v. Gilmer*, 116 N. C. 684, 22 S. E. 2; 117 N. C. 416, 23 S. E. 333; *Cooper v. McKinnon*, 122 N. C. 447, 29 S. E. 417. This exception is well taken, for the schedule is ³⁰⁹ an essential, and indeed an indispensable, part of the assignment. The plaintiffs insist, however, that this point was held otherwise in their former action against Buffaloe (*Martin v. Buffaloe*, 121 N. C. 34, 27 S. E. 995), but a reference to the decision shows that the point was not passed on; and if it had been, it would not have been *res judicata* in this action against cotrespanders, but would have the weight only of a legal precedent.

The rule that the judgment against the principal in an official or fiduciary bond is presumptive evidence against the sureties (Code, sec. 1345; *Moore v. Alexander*, 96 N. C. 34, 1 S. E. 536; *McNeill v. Currie*, 117 N. C. 341, 23 S. E. 216), does not apply, as this is not an action on the bond, but in tort.

Error.

TRESPASS.—BY GIVING A SHERIFF A BOND of indemnity against the consequences of his action in proceeding under a writ, a party ratifies the officer's unlawful act, and becomes jointly liable in trespass with him: See the monographic note to *Kirkwood v. Miller*, 73 Am. Dec. 142.

TORT FEASORS.—A JUDGMENT AGAINST ONE OF SEVERAL JOINT WRONGDOERS, without satisfaction or execution, is generally held not to be a bar to an action against the others: Note to *Seither v. Philadelphia Traction Co.*, 11 Am. St. Rep. 907. A contrary doctrine is laid down in *Petticolas v. Richmond*, 95 Va. 456, 64 Am. St. Rep. 811, 28 S. E. 566.

BANK OF TARBORO v. FIDELITY AND DEPOSIT CO.

[126 N. C. 320, 35 S. E. 588; 128 N. C. 366, 38 S. E. 908.]

SURETIES—BOND—PLEAS IN BAR—REFERENCE.—In a suit upon a penal bond where the answer raises pleas in bar which, if found in favor of the defendant, would put an end to the action, a compulsory reference cannot properly be ordered until such pleas are decided.

FIDELITY INSURANCE—PLEADING CONTRACT—DEFECT IN COMPLAINT CURED BY ANSWER.—In a suit upon a penal bond, the fault of the plaintiff in not setting out in full the contract of suretyship is cured by the pleading of the defendant in making it a part of his answer.

FIDELITY INSURANCE—BREACH OF BOND—PLEADING AND PROOF.—In a suit upon a penal bond, the defendant, if he relies upon breaches of the contract upon the part of the plaintiff to defeat a recovery, must plead and prove them.

FIDELITY INSURANCE—APPLICATION—BOND.—SURETY COMPANIES, whose bonds are modeled after some form of insurance policy, and are based upon applications containing a large number of questions and answers, are in the nature of insurance companies.

EVIDENCE—MEMORANDUM OF EXAMINATION.—In a suit by a bank upon the bond of its cashier, a memorandum of the examination of the cashier before a committee of the board of directors of the bank, prior to the suit, made at the time of the examination, and read over to the cashier, who said it was correct, is admissible in evidence.

SURETIES—RELEASE FROM LIABILITY.—Under a statute allowing a surety company to be released from its liability on

a bond on the same terms as an individual, such a company can release itself from liability only by getting off the bond.

FIDELITY INSURANCE—CONSTRUCTION—SURETY COMPANIES.—A BOND given by a surety company, which in its form and essence resembles an insurance contract, is to be construed as such a contract, most strongly against the company, and most favorably to their general intent and essential purpose.

FIDELITY INSURANCE—BREACH OF BOND—NOTICE TO SURETY COMPANY.—A bank is not required to give notice to a surety company, which has given a bond as surety for the bank's cashier, upon mere suspicion that the cashier was guilty of fraudulent conduct, but is entitled to a reasonable time to investigate in order to ascertain the facts which would justify the charge of fraud or embezzlement.

FIDELITY INSURANCE—BOND—DUTY OF BANK—INSTRUCTION.—In a suit by a bank upon a surety bond, an instruction that the officers of the bank are required to give the same supervision and care over the management of the affairs of the bank as an ordinarily prudent business man would give is correct.

H. G. Connor & Son and G. M. T. Fountain, for the plaintiff.

John L. Bridgers and Gilliam & Gilliam, for the defendant.

The original opinion of the court, officially reported in 126 N. C. 320, is as follows:

321 DOUGLAS, J. This is an action brought upon a penal bond given by the defendant, the Fidelity and Deposit Company, to secure the plaintiff against all loss from any fraudulent acts of its codefendant, Mehegan, as cashier of said plaintiff bank. This bond, which seems to have been modeled after some form of insurance policy, is extremely complicated, and is based upon an application containing a large number of questions and sub-questions. There appear to be twenty-three sections in the bond and thirty-one questions in the application. All the answers are made "conditions precedent." The complaint alleged the execution of the bond and its renewal, and set out the several alleged fraudulent acts of the defendant Mehegan, upon which it relied. It further alleged: "18. That immediately upon ascertaining the several fraudulent acts of the said James G. Mehegan, cashier as aforesaid, the plaintiff bank notified the defendant company thereof, and permitted the agent of said defendant to examine the books of said bank, and furnished said defendant with proof **322** of said loss more than three months before the bringing of this action." After demurrer overruled, the defendant company answered in part as follows:

"5. That in answer to allegation 5 of the complaint the defendant admits that there was a bond of indemnity executed by the defendant and said Mehegan, the defendant executing the

same as the surety of the said Mehegan, upon the date mentioned, and for the amount named, but the defendant denies that the terms and conditions of said bond are properly, correctly, and truly alleged. That a copy of the contract of suretyship entered into by the defendant with the plaintiff, and a copy of the notice of the expiration, statement by bank, and renewal receipt, are hereto attached and asked to be taken as a part of this answer.

"6. That allegation 6 of the complaint is admitted. But the defendant, further answering same, says and alleges that said contract and agreement was entered into and based upon the following statement and representations, to wit, those set out in the attached papers set out in the preceding paragraph hereof, which said statement, at the time it was made, to wit, December 15, 1896, was incorrect and untrue, and by reason of the incorrect and untrue statements contained therein the defendant was induced to execute and deliver to the plaintiff the said renewal receipt, and the defendant submits that it is not liable on account thereof."

The further defense of defendant company alleges:

"2. That by the terms, conditions, and covenant of said contracts of suretyship, the plaintiff assumed, obligated, and contracted to do and perform certain obligations therein named, the carrying out and performance of which by the said plaintiff was necessary to make said contract valid and binding upon the defendant, and to entitle the plaintiff to bring and maintain this action. That the said plaintiff has ³²³ neglected and failed to perform and carry out its obligations as aforesaid, and therefore is not entitled to recover in this action.

"3. That the plaintiff has failed to set out and allege that it has in all respects complied with and performed its part of the contract made with the defendant, as it was its duty to have so done, and the defendant submits that the plaintiff is not entitled to maintain and prosecute this action.

"4. That the said plaintiff has failed and neglected to carry out and perform its part of said contract, thereby causing and doing a wrong in the premises, and thereby discharging the defendant from liability on account of said contract."

The court below made the following order:

"In this cause it appearing to the court from an inspection of the pleadings and the record in the cause that the trial of the pleas in bar raised by the pleadings and other issues of fact herein will involve the examination and taking of a long account, it is ordered that the trial of issues of fact and of law be referred

to C. F. Warren, referee, pursuant to the provisions of subsection 1 of section 421 of the code. The defendant resisted the motion, contending that the cause was not referable."

In this we think there was error. The answers of the defendants, which were substantially to the same effect, raised pleas in bar which, if found in their favor, would put an end to the action and render a reference entirely unnecessary. Until such pleas are decided, a compulsory reference cannot properly be ordered. If the plaintiff has no right to recover at all, it makes no difference what amount he might be entitled to recover if he had a cause of action: *Railroad v. Morrison*, 82 N. C. 141, 143; *Cox v. Cox*, 84 N. C. 141; *Neal v. Becknell*, 85 N. C. 299; *Commissioners v. Raleigh*, 88 N. C. 120; *Smith v. Goldsboro*, 121 N. C. 350, 28 S. E. 479, and cases therein cited.

³²⁴ In the argument before us, the counsel for defendant company insisted that the complaint did not state facts sufficient to constitute a cause of action, inasmuch as it did not set out in full the contract of suretyship, and did not specifically allege that the plaintiff had performed each and all of the conditions and stipulations on which the contract was based. However the plaintiff may have been in fault in not setting out in full the contract of suretyship, it is cured by the pleading of the defendants who have themselves made it a part of their answers. We think, therefore, that the complaint does state a sufficient cause of action. The object of the contract was to secure the plaintiff against the fraudulent acts of its cashier. The complaint alleges the execution of the bond and its renewal, and sets out their substantial features, the alleged fraudulent acts of the cashier, and notice to the defendant company. These facts being proved would have made out the plaintiff's case. Nothing else appearing, the plaintiff would have been entitled to recover, and if the defendant company relied upon breaches of the contract on the part of the plaintiff to defeat a recovery, it should have specifically pleaded them. The burden of proving them would have rested upon the defendant. To require the plaintiff to set out each and all of the fifty conditions and stipulations in the bond and application, and then to prove affirmatively that he had performed each one of them, would practically defeat any recovery, and would amount to a denial of justice. Many of them are mere statements of fact, while some of them are agreements between the co-obligors, and do not concern the plaintiff. One of these conditions is as follows: "And lastly, should the employé become a defaulter and seek refuge in any foreign country, he hereby agrees to the enforcement against

him of the laws of such country as they are now or may be hereafter enacted relative to the commission ³²⁵ of injuries or offenses against an employer resident in such country." How an agreement between private parties can affect the criminal laws of a foreign country we fail to comprehend, and we are glad the question is not before us. We allude to it only to show the complicated nature of the conditions injected into bonds of indemnity which often tend to defeat the primary object of the contract. The old bond of indemnity was a simple instrument which could be easily comprehended and promptly enforced. If these new forms of contract are to take its place, we hope they will preserve some of its simplicity and efficiency. This is a matter of great importance, as surety companies are now allowed to make the bonds of trustees, guardians, administrators, and all other fiduciaries; and we would much regret to see the rights of orphan children, as well as other helpless beneficiaries, depend not upon the substantial merits of their case, but upon a multitude of technicalities in an instrument to which they were not parties.

In the case at bar the defendant company has failed to specify in its answer the breaches of contract by the plaintiff upon which it relies, except in one instance, and that not very distinctly, but we think sufficiently so, to admit of proof. It appears to us that section 6 of the answer means to allege that the defendant company was induced to renew the bond upon the written statement of the plaintiff bank that the books and accounts of the defendant Mehegan had been examined and found correct in every respect, and that all moneys handled by him had been accounted for; and to further allege that this statement was false. These allegations amounted to a plea in bar which the defendant had a right to have passed upon before a reference could be made.

These surety companies are in the nature of insurance companies, and, in fact, many of them do an insurance business ³²⁶ of one kind or another. The application before us suggests, *mutatis mutandis*, that of an insurance policy. It may, therefore, be well to see what this court has said with regard to such applications. In *Bobbitt v. Liverpool etc. Ins. Co.*, 66 N. C. 70, 8 Am. Rep. 494, it was said in what appears to have been really a dictum that the application must be set out in the complaint, and, being in the nature of a condition precedent, must be proved by the plaintiff. This rule was distinctly overruled in *Britt v. Mutual Ben. Ins. Co.*, 105 N. C. 175, 10 S. E. 896, where the court says: "The application is by the agreement made

a part of the contract, but it contains only stipulations which bind the assured. It is in possession of the defendant, and if there is a breach of any of its terms which will release the defendant company from its obligation, it is for the defendant to set out such obligation, and aver the breach or breaches thereof on which it relies." In that case the point is fully and ably discussed with numerous citations. While the further point is not professedly decided upon whom rests the burden of proof, we think it is inferentially settled by the universal rule that whoever is required to allege a fact is also required to prove it. The plea of the statute of limitations is an exception to the rule more apparent than real, because it is negative in its character. There, the plaintiff is required to prove that the transaction alleged by him occurred within the time limited by statute, as otherwise he would have no legal remedy.

The order of reference must be set aside, and the case first heard upon the plea in bar.

Error.

A rehearing having been applied for and granted, the court, instead of reversing, affirmed the judgment of the trial court, and the opinion directing such affirmance was as follows:

367 DOUGLAS, J. This case has been here before, and is reported in *Bank of Tarboro v. Fidelity etc. Co.*, 126 N. C. 320, ante, page 682, 35 S. E. 588. As far as that decision goes, it will be considered as final in the determination of this case.

The following are the issues as submitted and answered:

"1. Did Mehegan, as cashier and while in the performance of the duties of his office, between December 15, 1895, and September 3, 1897, fraudulently take from the assets and money of plaintiff bank the sum of five thousand dollars, and on May 27, 1897, for the purpose of concealing his fraudulent conduct, charge said amount to the City National Bank of Norfolk on the books of the plaintiff bank? A. Yes.

"2. Did the defendant Mehegan, between December 15, 1896, and September 3, 1897, as cashier, fraudulently take from the assets of the plaintiff bank a sum of money by means of overdraft on said bank aggregating one thousand dollars, and more? A. Yes.

"3. Did the defendant Mehegan, between December 15, 1895, and September 3, 1897, as cashier, fraudulently take from the assets and money of said bank the sum of nine thousand five hundred and fifty dollars, or other amount, and by false entries on the books of said bank conceal the same from the plaintiff bank? A. Yes.

"4. Did the defendant Mehegan, as cashier, between May 12, 1897, and August 6, 1897, fraudulently take from the ³⁶⁸ money and assets of said bank the sum of five thousand dollars, which he concealed by making false entries in the books of said bank? A. Yes.

"5. Did the defendant Mehegan, between December 15, 1895, and September 3, 1897, as cashier, fraudulently take money and assets of the bank and convert the same to his own use? A. Yes.

"6. Did the defendant, from September, 1896, to September 1, 1897, as cashier, fraudulently take from the money and assets of the said bank the sum of four hundred and fifty-two dollars and twenty-one cents, which he applied to his own use? A. Yes.

"7. Did the defendant Mehegan, as cashier, on the 3d August, 1897, fraudulently issue a cashier's check on the said bank to J. M. Norfleet to the amount of six hundred dollars for the purpose of paying an individual indebtedness of said Mehegan? A. Yes.

"8. Did the defendant Mehegan fraudulently discount notes and bills, and pay for the same with money of the bank without the knowledge and assent of the proper committees? A. Yes.

"9. Did the plaintiff notify the defendant Fidelity and Deposit Company of the alleged default of the said J. G. Mehegan as required by the bond? A. Yes.

"10. Did the plaintiff, after the execution of the surety contract, increase its capital stock? A. Yes. [This was answered by the jury, "Yes, in April, 1896."]

"11. Were the representations in the certificate for the renewal of the surety bond as to the dealings and accounts of the said Mehegan, cashier, true and correct when they were made? ³⁶⁹ A. Yes.

"12. Were such representations as to the dealings and accounts of the said Mehegan, cashier, on the said certificate false, to the knowledge of the plaintiff, at the time they were made? A. Yes.

"13. Did said representations constitute a material inducement of the defendant company to continue said bond from December 15, 1896, to December 15, 1897? A. Yes.

"14. Did the plaintiff cause to be observed due and customary supervision over said Mehegan, cashier, for prevention of default? A. Yes.

"15. Did the Fidelity and Deposit Company have notice of the increase of the capital stock before the extension of the bond? A. Yes."

The defendant assigns for error: "1. That the court erred in admitting the written statement as excepted to; 2. For error in instructing the jury as set out in the charge to the jury; 3. In that the instructions are inconsistent, contradictory, and misleading; 4. In the construction of the meaning of the words 'immediately notified'; 5. In instructing the jury that the same supervision and duty required of the officers of the plaintiff bank, over the management of the affairs of the bank, was such care, supervision, and duty as the ordinarily prudent business man would give; 6. For refusing to instruct the jury as requested in the several prayers submitted by the defendant."

The first assignment of error cannot be sustained. The admitted paper was a memorandum of the examination of the defendant Mehegan before a committee of the board of directors of the plaintiff bank, and taken down by the witness ³⁷⁰ Davis, who testified as follows: "Mehegan was present before the committee; he was examined; his examination was put in writing. I read every sentence to Mehegan, as Mr. Fountain propounded the questions; then I wrote down Mehegan's answer. I read the questions and answers as they were made, and he said that they were correct. The entire paper is in my handwriting. Then read the whole over to Mehegan. He never refused to sign, never was asked to sign it." Under such circumstances, we think the paper was admissible as part of the testimony of Davis, with whose credibility, of course, its own was involved: *Bryan v. Moring*, 94 N. C. 687; *State v. Pierce*, 91 N. C. 606; *State v. Jordan*, 110 N. C. 491, 495, 14 S. E. 752.

We do not think that either the second or third assignments can be sustained. The judge's charge extends through fifteen pages of the printed record, and is full, clear, and explicit, and, we think, free from substantial error. Many of the points raised by the defendant come under the principles decided when the case was first before us. We then said (*Bank of Tarboro v. Fidelity etc. Co.*, 126 N. C. 324, ante, p. 683, 35 S. E. 589): "The object of the contract was to secure the plaintiff against the fraudulent acts of its cashier. The complaint alleges the execution of the bond and its renewal, and sets out their substantial features, the alleged fraudulent acts of the cashier, and notice to the defendant company. These facts being proved would have made out the plaintiff's case. Nothing else appearing, the plaintiff would have been entitled to recover, and if the defendant company relied upon breaches of the contract on the part of the plaintiff to defeat a recovery, it should have specifically pleaded them. The burden of proving them would have rested upon the

defendant. To require the plaintiff to set out each and all of the fifty conditions and stipulations in the bond and application, and then prove affirmatively that he had performed each one of them, would practically defeat any recovery, and would amount to a denial of justice."

³⁷¹ That this is now the law of this case, and our opinion of its correctness, has been confirmed by subsequent investigation and further reflection. The object of an indemnifying bond is to indemnify; and if it fails to do this, either directly or indirectly, it fails to accomplish its primary purpose, and becomes worse than useless. It is worthless as an actual security, and misleading as a pretended one.

The defendant lays great stress upon section 5, chapter 300 of the Laws of 1893, which is as follows: "Any company executing such bond, obligation, or undertaking may be released from its liability as surety on the same terms as are or may be by law prescribed for the release of individuals upon any such bond, obligation or undertaking." It seems clear to us that the only object of that section was to enable such company to release its liability by getting off the bond whenever an individual could do so; but not to remain on the bond and limit its liability by such unreasonable restrictions as would practically amount to a release by tending to defeat a recovery. Moreover, that section says: "On the same terms as are or may be by law prescribed." Where are any such terms prescribed by law as those which appear in the bond before us, and which the defendant is so strenuously endeavoring to bring within the terms of that section? We are sure that act never intended to authorize trustees, guardians, or administrators to give bond with such stipulations, construed as the defendant is now asking us to construe them. The defendant again insists that it should have the same right to limit its liability as is possessed by an individual. That may be; but no member of this court has ever seen or heard of a bond in such a form being tendered by a private surety. In its very form and essence, the bond before us resembles an insurance contract, and differs materially from the ordinary forms coming down to us by immemorial usage. Therefore, we must place such bonds in the general class of insurance policies, ³⁷² and construe them upon the same general principles; that is, most strongly against the company, and most favorably to their general intent and essential purpose: *Bank of Tarboro v. Fidelity etc. Co.*, 126 N. C. 320, 325, ante, p. 682, 35 S. E. 588; *American Surety Co. v. Panly (No. 1)*, 170 U. S. 133,

18 Sup. Ct. Rep. 552. In the latter case, Justice Harlan, speaking for a unanimous court, says on page 144: "If, looking at all its provisions, the bond is fairly and reasonably susceptible of two constructions, one favorable to the bank and the other favorable to the surety company, the former, if consistent with the objects for which the bond was given, must be adopted, and this for the reason that the instrument which the court is invited to interpret was drawn by the attorneys, officers, or agents of the surety company. This is a well-established rule in the law of insurance: *National Bank v. Insurance Co.*, 95 U. S. 673; *Western Ins. Co. v. Croper*, 32 Pa. St. 351, 355, 75 Am. Dec. 561; *Reynolds v. Commerce etc. Ins. Co.*, 47 N. Y. 597, 604; *Travellers' Ins. Co. v. McConkey*, 127 U. S. 661, 666, 8 Sup. Ct. Rep. 1360; *Fowkes v. Manchester etc. Assn.*, 3 Best & S. 917, 925. As said by Lord St. Leonards, in *Anderson v. Fitzgerald*, 4 H. L. Cas. 484, 507: 'It [a life policy] is, of course, prepared by the company, and if, therefore, there should be any ambiguity in it, must be taken, according to law, most strongly against the person who prepared it.' There is no sound reason why this rule should not be applied in the present case. The object of the bond in suit was to indemnify or insure the bank against loss arising from any act of fraud or dishonesty on the part of O'Brien in connection with his duties as cashier, or with the duties to which, in the employer's service, he might be subsequently appointed. That object should not be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the company if there be another construction equally admissible under the terms of the instrument executed for the protection of the bank." To the same effect are the cases of *Imperial Fire Ins. Co. v. Coos Co.*, 151 U. S. 452, 14 Sup. Ct. Rep. 379; *London Assur. v. Campanhia* ³⁷³ *de Moagens do Barreiro*, 167 U. S. 149, 17 Sup. Ct. Rep. 785; *Morton v. Life Ins. Co.*, 122 N. C. 498, 65 Am. St. Rep. 717, 29 S. E. 944; *Grabbs v. Farmers' etc. Ins. Co.*, 125 N. C. 389, 398, 34 S. E. 503, and cases therein cited. The same principle of construction has been applied to the contracts of common carriers: *Wood v. Southern Ry. Co.*, 118 N. C. 1056, 1063, 24 S. E. 704; *Mitchell v. Carolina Cent. Ry. Co.*, 124 N. C. 236, 32 S. E. 671; *Jeffreys v. Southern Ry. Co.*, 127 N. C. 377, 37 S. E. 515; *Hinkle v. Southern Ry. Co.*, 126 N. C. 932, 78 Am. St. Rep. 685, 36 S. E. 348.

The defendant has voluntarily become by virtue of the statute what may be called a "common surety," not exactly in the nature of a common carrier, like railroad and telegraph com-

panies, but still one of those public agencies to which are given unusual powers and which have assumed the most sacred responsibilities. Permitted by law to act as sole sureties for trustees, guardians, administrators, and other fiduciaries, they are held by the policy of the law to the full measure of the responsibility they have voluntarily assumed. They may make such reasonable regulations as are necessary for their own protection or the proper transaction of their business; but such stipulations will be most strongly construed against a forfeiture of the indemnity for which alone the bond is given, and in favor of a fair and equitable construction of the essential purposes of the contract.

The fourth exception is equally untenable. On that point his honor charged as follows: "If you find from the testimony that the plaintiff bank, in a reasonable time and with due diligence under the circumstances as explained in these instructions, and in view of all the facts in evidence, gave notice of the default of said Mehegan, you should answer the ninth issue 'Yes.' The plaintiff was not required by the terms of the bond to give notice to defendant company upon suspicion that Mehegan was guilty of fraudulent conduct. The plaintiff was not required to give notice to the defendant company until it had actual knowledge of such facts as would justify the charge of default, and it was entitled to a reasonable time to investigate the condition of said Mehegan's accounts ³⁷⁴ before it was required to give such notice, if such investigation was necessary to ascertain the facts which would justify the charge of fraud."

In this we see no error. The plaintiff was not required to act upon mere suspicion in preferring so grave a charge as fraud or embezzlement. Moreover, reasoning from analogy to the rights of a guarantor, the defendant does not appear to have suffered any material injury from such delay, even if the plaintiff had been responsible for the delay, which the jury found to the contrary. But the defendant contends "that if the surety is 'immediately notified' of the defalcation, upon its discovery, the surety would have an opportunity to deal with the defaulter, and secure some part, if not all, of its loss; this case proves at once the wisdom and justice of such a provision, for by not notifying the surety 'immediately,' the plaintiff was enabled to get all the security the defaulting principal, the cashier, could give, and the surety had no opportunity." The plaintiff had the right to resort to all the property of the defaulting cashier, whether he gave bond or not; and if the defendant means to contend that by signing the cashier's bond as surety it acquired a right of reimbursement superior to that of the bank, we can

only say that it does not so appear to us either from the terms of the bond or the general principles of law.

The fifth assignment of error cannot be sustained, as we think the charge of his honor was correct. In fact, no other rule justly capable of practical application suggests itself to us.

The sixth exception is equally untenable. The defendant submitted twelve special instructions, occupying five pages of the printed record. It is useless as well as impracticable to consider each in detail. All we need now say, in addition to what has already been said, is that they were all properly refused, either for intrinsic error or because sufficiently given ³⁷⁵ in his honor's charge. In the absence of substantial error the judgment of the court below is affirmed.

A FIDELITY INSURANCE CONTRACT is governed by the principles of interpretation applicable to ordinary policies of insurance: *Note to Fidelity etc. Co. v. Gate City Nat. Bank*, 54 Am. St. Rep. 446. See, in this connection, *State v. Hogan*, 8 N. Dak. 301, 73 Am. St. Rep. 759, 78 N. W. 1051.

FIDELITY INSURANCE.—NOTICE OF DISHONESTY of an employé, where a company undertakes to insure a faithful discharge of his duties, is discussed in *Fidelity etc. Co. v. Gate City Nat. Bank*, 97 Ga. 634, 54 Am. St. Rep. 440, 25 S. E. 392; *Lancashire Ins. Co. v. Callahan*, 68 Minn. 277, 64 Am. St. Rep. 475, 71 N. W. 261.

FAISON v. GRANDY.

[128 N. C. 438, 38 S. E. 897.]

INTEREST—CONFLICT OF LAWS.—Where money is loaned in one state upon real estate situated in another, the security being the basis of the loan, the rate of interest is governed by the laws of the latter state.

USURY—PROMISSORY NOTE—PURCHASE BEFORE MATURITY.—A promissory note embracing usurious interest is void in the hands of a purchaser, though before maturity and without notice.

USURY—PERSONAL DEFENSE.—The defense of usury is personal to the debtor, or borrower, or other person who has an interest in the transaction which can be injuriously affected by the usury.

USURY—ESTOPPEL TO URGE DEFENSE OF.—WHERE A JUDGMENT expressly provides that all issues relating to usury have been reserved, by consent, to be passed upon by a referee, a party is not estopped from raising the defense of usury upon a hearing before such referee.

ESTOPPEL.—REPRESENTATIONS AND STATEMENTS made to one who does not act or rely upon them, and who is not misled by them, do not work an estoppel.

Day & Bell, R. B. Peebles, and D. L. Russell, for the plaintiff.

T. N. Hill, Pruden & Pruden, and Shepherd & Shepherd, for the defendants.

⁴³⁹ COOK, J. This action is now reheard upon the petitions of both plaintiff and defendants. It was heard at February term, 1900 (Faison v. Grandy, 126 N. C. 827, 36 S. E. 276), upon appeal by plaintiff from the judgment rendered by his honor, Judge Brown, upon exceptions thereto taken.

The plaintiff now assigns as grounds for hearing:

1. For that the court overlooked the fact that the record showed that items of usurious interest other than the \$638.93 mentioned in the opinion of the court, entered into the consideration of the \$10,000 bond, and two drafts aggregating \$4,400, to wit: On page 173 of printed record, \$119.71; on page 174, \$132.81, \$933.38, \$575; on page 175, \$120.63, \$62.12, \$711.07, \$97.34—all of these sums were interest at the rate of nine per cent per annum charged in the account on page 175, which amounted to \$14,421.74 up to January 1, 1876, and which was settled by the \$10,000 bond and two drafts. All of said sums were charged against plaintiff by the referee and court below, upon the ground that the plea of usury was not open to plaintiff. The referee found as a fact that there was in said account \$638.93 charged against Faison as a bonus, and for which Faison received nothing. This sum was separate and apart from the interest charged in said account at nine per cent. In said account The Farmers and Merchants' Loan and Trust Company credited Faison with certain items of interest at nine per cent, to wit: On page 174, \$138.99, \$54.82, \$190.43, \$178.32. These items, of course, should be deducted from the items above mentioned as having been charged against said Faison.

2. For that the court overlooked a clerical error of \$208.71 ⁴⁴⁰ made by the referee. This error occurred in this way, to wit: In the account, amounting to \$14,421.74, interest was calculated up to January 1, 1876, and when the bond and drafts were given to close it, they drew interest from that date. In making out the accounts mentioned in finding 14, page 79, the referee overlooked that fact, and brought his account down to March 2, 1876, and included interest up to that time, and still his account fell short of the account closed by bond and drafts \$638.93. If he had stopped at January 1, 1876, his account would have been two months' interest smaller, to wit, \$208.71, and hence the difference would have been \$845.67 instead of \$638.93.

3. That the court overlooked the fact that the "improper charges" did not consist of interest in excess of legal rates. Said sum was made up as follows: Out of the \$9,500 note due June 2, 1873, came \$495.20. This note was charged to Faison at \$9,500, page 174. The referee charged it at \$9,004.80, making a difference of \$495.20 of principal, not interest, because the referee found that Faison got for said note only \$9,004.80. Referee disallowed item of \$78.75, page 175, October 14, 1875, was not allowed against Faison. Item of \$48.25 (charged twice) was allowed once only. Item of \$82.71, page 172, was allowed at \$80.00, making \$495.20, \$78.75, \$48.25, \$625.91. The balance of \$16.73 must have arisen from error in calculation. Excepting the above items, the record will show that the referee allowed against Faison every item contained in accounts on pages 170 to 176, with interest at nine per cent per annum (see pages 89 to 93), except the following, which appeared both on the debit and credit sides of the account, to wit, \$2,373.00 and \$1,267.55 charged on page 173, and credited on page 174 and page 176, and item \$3,390, charged on page 175, credited on page 176, and \$2,935.45 charged on page 174, and credited on page 173.

441 His honor, Judge Brown, held that the referee was in error in his first conclusion of law—"that the said trust company, notwithstanding its charter, is subject to the general interest and usury laws of Virginia, and consequently that the note for \$9,500, dated March 1, 1873, bearing nine per cent interest on its face is usurious." From this ruling defendants did not appeal, and plaintiff not having assigned the same as error upon rehearing, it must so stand. While we agree with his honor in his conclusion that the transaction was usurious, we differ from him in the reasoning. The record shows that the money was loaned upon real estate security situate in this state, the security being the basis of the loan; the rate of interest is governed by the interest laws of this state, notwithstanding that the loan was made in the state of Virginia—the reasons for which fully appear in *Meroney v. Atlanta etc. Loan Assn.*, 116 N. C. 882, 47 Am. St. Rep. 841, 21 S. E. 924 (and in *Jackson v. American Mortgage Co.*, 88 Ga. 756, 15 S. E. 812, a case therein cited). Interest, therefore, should have been charged at the rate of six per cent—not nine.

It therefore follows that those items of interest which are charged at nine per cent are usurious, and the items of account to which errors are assigned upon the rehearing must be restated with interest calculated at six per cent, both upon the debit and

credit sides, and the errors pointed out in plaintiff's third assignment must be corrected, excepting, however, from the restatement of the account the interest on the \$9,500 note, to which usury is not pleaded and to which no exception is taken upon appeal. For in plaintiff's complaint, allegation 67, he says: "This does not apply to the \$9,500 note of March 1, 1873, on which plaintiff admits nine per cent interest was properly charged"; and in exception 56 he says: "He should have held that said company had the right to charge nine per cent on the \$9,500 note." The second assignment of plaintiff is a patent error and must be corrected. ⁴⁴² The record shows that the referee added interest on the sum total from January 1, 1876, to March 2d (two months and two days—\$208.71); and when the note and draft were executed in May, 1876, for that sum, they bear interest from January 1, 1876, thus charging interest twice for two months and two days during the same time.

Defendants' petition for rehearing is based upon errors assigned: 1. That the note was assigned to Mrs. Grandy and William Selden in 1881, instead of February 2, 1878, as stated by the court; 2. That the item of \$638.93 was not usurious as held by the court; 4. That it was error in holding that the plaintiff was not precluded from setting up the plea of usury against the \$10,000 note, and was not estopped from pleading usury; 5. That plaintiff was not entitled to a credit of the \$638.93 item; 6. That they should not have been taxed with the costs in this court.

A careful review of the ruling of this court upon the item of \$638.93, pointed out in the second and fifth assignments by defendants fails to discover any error in its former decision, and the same is reaffirmed.

In considering the defendants' other assignments upon petition to rehear, the record reveals the fact that the transfer of notes by the loan and trust company was, as claimed, made on February 2, 1878, instead of 1881, as reported by the referee (33), and adopted by this court (at February term, 1900), as correct; but this does not alter the status of the parties, except in so far as it shows that the note was transferred to William Selden and Mrs. Grandy before maturity, which is not material, since it is the well-settled law of this state that a note embracing usurious interest is void ⁴⁴³ in the hands of a purchaser before maturity and without notice: *Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717, and cases there cited, wherein *Coor v. Spicer*, 65 N. C. 401, is disapproved.

This brings us to the consideration of the assignment taken

to the ruling of this court in holding that his honor, Judge Brown, was in error in adjudging that the plaintiff was precluded from setting up the plea of usury against the bond, it being the third finding in his judgment.

It is contended by defendants that the plea of usury is personal, and can be interposed only by the maker of the note; that the note was executed by John Faison, not Frank, who has interposed it in this action. "It is a well-established rule that the defense of usury is personal to the debtor or borrower and his privies by law or contract": Webb on Usury, sec. 365; Davis v. Garr, 6 N. Y. 124, 55 Am. Dec. 398. And it is true that it is a personal defense, and the right of affirmative relief is likewise personal; but it is personal in the sense that it is to the exclusion of strangers, or parties disconnected with the immediate transaction. It is limited to the borrower or debtor upon whom the burden falls whether he be the maker of the note (the evidence of the debt) or not, or otherwise has an interest in the transaction which can be injuriously affected by the usury. In this case the plaintiff was the original debtor; the debt was secured by his "Urquhart" and "Round Pond" tracts of land, the legal title to which was shifted to John, accompanied with his (plaintiff's) debt. But plaintiff did not cease to be a debtor; he continued in possession, and occupied, managed, and controlled on his own account both of said tracts, and made payments upon said debts. It was not upon the credit of John W. Faison, who is alleged in defendant's answer to have been insolvent (paragraph 35), that the money was advanced in taking up the note, but upon the value of the land which had by common consent been taken out of the name of plaintiff and put into ~~444~~ that of John. The bidding in of a \$22,000 tract of land encumbered with only \$4,680.81 of purchase money for \$1,000, and the Round Pond tract for \$2,500 by the loan and trust company, for which they took deed, and then conveying same land to plaintiff's brother, John, and taking a security upon said land for the \$10,000 note, and upon a tract of John's land to secure the two drafts which covered the indebtedness due by plaintiff in which the usury was embraced, was well known to the parties to the transaction, coupled with the further agreement that plaintiff should pay off that indebtedness and John would reconvey the land to him, was all on paper, leaving the actual relations of the parties unchanged so far as otherwise could appear. John exercised no control over the land or the use or profits of it. Should the Urquhart and Round Pond tracts have been sold under the trust, it would have been no loss

to John, but to plaintiff, whom John was helping. Therefore, it was to plaintiff's interest that the debt should be paid, to the end that the title be reconveyed to him, in the payment of which, or any part thereof, the plaintiff was directly interested, just as much as if the papers had been signed by himself instead of John. He, being the substantial debtor, had a right to set up a personal plea in his behalf to protect his interest involved in the transactions with the other parties, out of which this litigation has grown.

The defendants further insist that the plaintiff is estopped by the judgment rendered by Judge Boykin from claiming that the sum owing by him was less than \$14,000 and interest. But in what way we are not able to see. The judgment expressly provides that "all the issues relating to the questions of usury have been reserved, by consent, to be hereafter passed on by any referee who may be appointed to state an account in this action," and W. R. Allen was appointed referee and ordered "to pass upon the issues raised by the plea of usury and report his findings and rulings," etc., which he has done, and ⁴⁴⁵ his report is here on appeal by plaintiff from the judgment rendered thereon by Judge Brown confirming the same.

Nor are we able to see the force of defendant's contention of an estoppel in pais precluding plaintiff from pleading the statute of usury. Defendants cite the testimony of plaintiff, wherein he says that, having failed to get the account settled by arbitration with the loan and trust company, and failing to get it correctly adjusted, he accepted the statement of the trust company, because he could not raise the money to take up the liens, and got Grandy & Sons to give the drafts and take up the note. But defendants, Grandy & Sons, not only do not set up such defense, but aver in their answer that they took up the debts "in order to befriend John W. Faison, and prevent a sale of said property and a probable sacrifice thereof," which was threatened by the administrator (paragraph 27 of answer); also in paragraph 7 of their answer, they aver that "some time after the execution of said note for \$10,000 and deed of trust, the said John W. Faison apprehending applied to the defendants, C. W. Grandy & Sons, to assist him. . . . The said C. W. Grandy & Sons, believing said note to be well secured and good, interested themselves in the matter and induced Dr. William Selden and Mrs. Ann D. Grandy, executrix of C. W. Grandy, Sr., to purchase, . . . and this was done. The defendants, C. W. Grandy & Sons, . . . were actuated in making the arrange-

ments solely by motives of friendship for him." From plaintiff's testimony it seems that he thought defendants were favoring him, while they deny the same by saying that they were actuated solely by motives of befriending John W. Faison. Surely, defendants cannot be prejudiced by representations or statements, which they did not act or rely upon; nor can they now claim that they were misled, in contradiction of their own positive averment. Had they been misled by the representations and statements of plaintiff, and in consequence of such had acted **446** to their injury, then he would have been estopped; otherwise not. As the case is retained for further directions in the court below, no judgment will be entered in this court, and proceedings will there be had in accordance with this opinion.

Error and petition allowed.

USURY.—THE RIGHT TO PLEAD usury is personal to the debtor: *Zeigler v. Maner*, 53 S. C. 115, 69 Am. St. Rep. 842, 30 S. E. 829.

NEGOTIABLE INSTRUMENT.—THE DEFENSE OF USURY cannot be maintained against a bona fide holder of a negotiable instrument, unless the statute declares such instrument to be void: *Lynchburg Nat. Bank v. Scott*, 91 Va. 652, 50 Am. St. Rep. 860, 22 S. E. 487.

INTEREST.—IF A MORTGAGE IS GIVEN ON LAND in one state to secure a loan payable in another, the law of the former state prevails in the settlement of interest on foreclosure, provided the money loaned is used in that state: *Meroney v. Atlanta Bldg. etc. Assn.*, 116 N. C. 882, 47 Am. St. Rep. 841, 21 S. E. 924. See, further, *Hale v. Cairns*, 8 N. Dak. 145, 73 Am. St. Rep. 746, 77 N. W. 1010; *Pioneer Sav. etc. Co. v. Cannon*, 96 Tenn. 599, 54 Am. St. Rep. 858, 36 S. W. 386; monographic note to *Bank of Newport v. Cook*, 46 Am. St. Rep. 201.

STRAUSS v. MUTUAL RESERVE FUND LIFE ASSN.

[126 N. C. 971, 36 S. E. 352; 128 N. C. 405, 39 S. E. 55.]

BENEFIT SOCIETIES—CHANGE IN BY-LAWS.—A mutual benefit association cannot enter into a contract with one of its members, and, after receiving large sums upon such contract, so alter its essential terms without the consent of the member as to practically destroy its value.

BENEFIT SOCIETIES—EXPULSION OF MEMBER—ILLEGAL ASSESSMENT—DAMAGES.—In a suit against a mutual benefit association by a member who has been wrongfully expelled therefrom on account of having refused to pay an excessive and invalid assessment, he is entitled to recover the amount of the

premiums and dues he has paid, with interest thereon from the date of each payment.

BENEFIT SOCIETIES—POWER TO CHANGE BY-LAWS. Whatever may be the power of a mutual association to change its by-laws, such changes must always be in furtherance of the essential objects of its creation, and not destructive of vested rights.

BENEFIT SOCIETIES—RULE OF DAMAGES.—In an action against an insurance company upon a breach of its contract, the rule that the insured may recover as damages the amount of the premiums paid, with interest, applies as well to mutual associations as to old line insurance companies.

BENEFIT SOCIETIES—CHANGE IN BY-LAWS.—A MERE GENERAL CONSENT on the part of one who enters a mutual benefit association that the constitution and by-laws may be amended applies only to such reasonable regulations as may be within the scope of its original design.

LAW—RULES OF—SUBSTANTIAL JUSTICE.—Rules of law must be adjusted to the end that actions will be capable of a practical determination, with a reasonable certainty of substantial justice.

W. W. Clark, for the plaintiff.

Shepherd & Busbee, Shepherd & Shepherd, J. W. Hinsdale, Hinsdale & Lawrence, and Sewell Tyng, for the defendants.

The original opinion of the court, officially reported in 126 N. C. 972, 36 S. E. 352, is as follows:

972 DOUGLAS, J. This is an action brought to recover damages for the alleged wrongful cancellation of a policy of insurance. The record comprises over five hundred pages, with a large number of insertions, amounting in the aggregate to perhaps six hundred pages of printed matter. The case was fully and ably argued at length, and we have been favored with well-prepared and exhaustive briefs. And yet we see but one simple point essential to the determination of the case: Can a mutual association, by whatever name it may be called, or whatever may be its purposes, enter into a contract with one of its members, and after receiving large sums upon said contract alter its essential terms without the consent of the member, so as practically to destroy its value? We think not. The plaintiff became a member of the plaintiff association in 1883, and received a policy in the form of a certificate of membership, wherein it was expressly agreed that assessments should "be made upon the entire membership in force at the date of the last death for such a sum as the executive committee may **973** deem sufficient to cover said claims, the same to be apportioned

among the members according to the age of each member, as per table indorsed " on said certificate.

It appears from the findings of fact that the plaintiff paid all demands made upon him up to the year 1898, and call No. 96. This last call he refused to pay on the ground that it was exorbitant and contrary to the express terms of his policy. It seems that by successive resolutions, none of which were amendments to its constitution, the association has placed in a separate class all members who entered prior to 1890, and requires them to pay on the basis of the age attained by each at the date of each assessment; while other members continue to be assessed only as of their age of entry. That the result of such discrimination is injurious to the plaintiff clearly appears from the sixteenth, eighteenth, twenty-first, and twenty-second findings of fact as follows: "16. . . . That since the last resolution of 1898, the plaintiff and all who joined said company prior to 1890, and who held policies similar to plaintiff's, were assessed at their full attained age at rates applicable to such age, whereas persons who became members since 1890, and who held policies under what is styled the ten-year class and the five-year class, are only assessed at their age of entry, and plaintiff is thereby assessed at a higher amount than if the entire membership were assessed at rates of their attained ages."

"18. That call No. 96, made on plaintiff in 1898, and pursuant to the resolutions of said year, is larger in amount than it would have been had all the members of the association been assessed at their full attained ages."

"21. That the present value of plaintiff's policy, assuming that the rates were properly established and the members lawfully classified, was at the time he ceased to be a member of said company only a nominal sum, as by said classification 974 and rating the amount of policy discounted to such time would not exceed the present value of premiums which would be due and payable for the period of plaintiff's expectancy."

"22. That if the entire membership of the company had been rated and assessed at their attained ages and no distinction made among the classes, then the present value of plaintiff's policy would be more than the present value of the premiums, and the policy have a substantial present value, but there are no data given from which said damage can be estimated or even approximated."

Upon his findings of fact the court below concluded as matter of law that the assessments made in pursuance of the resolutions of 1898 were "in violation of defendant's constitution,

and excessive and invalid"; that the defendant, having ceased and refused to recognize the plaintiff as a member on account of his having refused to pay such excessive and invalid assessment, had broken its contract, and had become liable to the plaintiff in damages to be measured by "the amount of premiums and dues paid by plaintiff prior to call 96, with interest thereon from date of each payment." Judgment was rendered accordingly. In it we see no error.

All that we decide in the present case is that the defendant has violated its contract with the plaintiff in a material matter, whereby the plaintiff, having suffered substantial injury, is entitled to substantial damages. We do not decide that a mutual insurance company, or any other kind of insurance company, cannot issue policies of divers kinds and classes if so authorized by its charter, nor do we decide that a member of a purely mutual association is not bound by all reasonable by-laws and changes lawfully made therein. We are not considering the enforcement of a contract inequitable on its face, but the violation of a lawful contract by attaching thereto, without the consent of the plaintiff, conditions which ⁹⁷⁵ utterly destroy its value. It is evident that if the resolution of 1898 is binding upon the plaintiff, he would in any event be eventually forced out of the company by the constantly increasing premiums. There is one fact that does not clearly appear from the record and upon which counsel themselves seem to differ, which, while not essential to the determination of this case, seems worthy of notice:

On the hearing it was contended that the defendant association had the right to subsequently rearrange its members into classes so as to make each class bear the burden of insuring its own members. If by that the association claims the right to place all its members who entered before 1890 into a distinct class, entirely separate from the other members, and make them raise exclusively among themselves enough to pay all death claims that may occur among their own number, we cannot admit the right unless such was the understanding when the original contract was made.

What would be the result? Suppose certain men start a mutual association and support it through all its infant struggles into a vigorous and enlarged growth. In the course of time the new members would naturally outnumber the old ones. Suppose they should say to the old members: "You are getting old, and therefore your insurance is more costly than ours; we will place you in a class by yourselves and make you insure each other

without any help from us; it is true you have borne the heat and burden of the day, and we are resting in the shade of the tree you have planted, but that makes no difference to us; insure yourselves or leave." Of course, as one by one died off, the burden would be greater upon the survivors, as a death claim of one thousand dollars bears more heavily upon twenty men than it would upon a hundred. Finally, two would be left. When one died, the other would have to pay his entire policy, and then pay his own policy ⁹⁷⁶ at his own death. Would this be insurance, and could it be said that any claim, which would lead to such a result, is sound in principle? It may be that the association has provided for such cases, but it is apparent that if any class of men is set apart and no new blood permitted to enter, it will eventually die out. If a man voluntarily goes into such a contract with his eyes open, we are not inclined to help him, but his valid existing contract cannot be changed into such a contract without his consent. Whatever may be the power of a mutual association to change its by-laws, such changes must always be in furtherance of the essential objects of its creation, and not destructive of vested rights.

It is admitted that the measure of damages followed by the court below is the established rule in this state: *Braswell v. Insurance Co.*, 75 N. C. 8; *Lovick v. Life Assn.*, 110 N. C. 93, 14 S. E. 506; *Burrus v. Insurance Co.*, 124 N. C. 9, 32 S. E. 323. But it is contended that this rule was established purely in contemplation of old line companies, and was not intended to apply to mutual associations. Whatever may have been the inception of the rule we see no better one to adopt, and, as at present advised, must follow our own precedents. The judgment of the court below is affirmed.

A rehearing having been applied for, the court rendered the following opinion, affirming its previous decision and denying the petition for rehearing:

⁴⁶⁶ DOUGLAS, J. This case is before us on a rehearing, being originally reported in *Strauss v. Mutual Reserve Fund Life Assn.*, 126 N. C. 971, ante, p. 700, 36 S. E. 352. We have again given it careful consideration, and have been forced to the same conclusions announced in our former opinion. It seems useless to again discuss the principles involved, as they are few and simple as the case is viewed by us. The plaintiff had a contract of insurance with the defendant, which the latter seems to have violated in its most essential features, with the result of having destroyed its value to the plaintiff. But it is said that the plaintiff made such contract of insurance with

a mutual insurance association of which he was a member, and by virtue of such membership; and that he is therefore bound by all such rules and regulations as may be thereafter lawfully adopted. "Lawful adoption" may mean much or little. Rules may be adopted under the forms of law that might nevertheless be so unreasonable and inequitable as to be clearly beyond any possible contemplation of law. In any event, such rules can never have any greater force than the law that authorizes their adoption, and if this has the effect of impairing the obligation of a contract, it is void by constitutional inhibition.

But it is said that the plaintiff, upon entering the association, agreed, expressly or impliedly, that changes might be made in its constitution and by-laws, and is bound thereby. We have no evidence that he agreed that such changes might be made as were made; and we have no idea that he ever intended to place it within the power of the association to break his contract at pleasure, or render it utterly valueless by subsequent stipulations or regulations adopted without his consent. A mere general consent that the constitution and by-laws ⁴⁶⁷ may be amended applies only to such reasonable regulations as may be within the scope of its original design. We must again repeat what we said in our former opinion: "Whatever may be the power of a mutual association to change its by-laws, such changes must always be in furtherance of the essential objects of its creation, and not destructive of vested rights."

It is urged by the defendant that if the plaintiff is entitled to any relief, it is not by recovery of the premiums he has paid, but by mandamus for reinstatement. This remedy is not demanded by the plaintiff, nor does it seem practicable to us. It is true we might issue the mandamus to a foreign corporation having its general offices in New York, but how to make such a mandamus effective is a different question, the solution of which is not at all clear to us. Moreover, in the present instance the plaintiff, Strauss, is now dead. Much stress has been laid upon the fact that the supreme court of Minnesota, in *Ebert v. Mutual Reserve Fund Life Assn.* (1900), 81 Minn. 116, 83 N. W. 506, 84 N. W. 457, while agreeing with us upon the main question of the right of recovery, differs with us as to the measure of damage. We are much impressed with the views of the court upon that point, which have much to commend them as theoretical propositions; but we are equally impressed with the frank admission of the court as to the difficulty of their practical application.

Our own rule, even in our own minds, falls short of theoretical perfection, but after most careful consideration we are unable to find a better. The impaired health of the insured, or his having passed the insurable age, would present complications practically insurmountable in the actual trial of an action. Moreover, the defendant claims that the plaintiff's insurance has cost more than he has paid in, and therefore his recovery would be nothing. The plaintiff would have no means of disproving the alleged cost of his past insurance, the ⁴⁶⁸ proof of which would be exclusively in the possession of the defendant. He might cross-examine the defendant's witnesses or demand its books and papers; but if he got them, what could he do with them? It seems to have taken the defendant several years to find out that the plaintiff's insurance was costing more than his premiums, and this it did only with the assistance of the insurance commissioner of New York and expert actuaries. With or without such assistance, what chance would the average juror have of mentally digesting five hundred pages of insurance statistics?

All actions must be capable of a practical determination, with a reasonable certainty of substantial justice; and rules of law must be adjusted to that end, even if in exceptional cases they fall short of the full measure of ideal right. A distinguished jurist has said: "Indeed, one of the remarkable tendencies of the English common law upon all subjects of a general nature is, to aim at practical good rather than at theoretical perfection; and to seek less to administer justice in all possible cases, than to furnish rules which shall secure it in the common course of human business": Story's Equity Jurisprudence, 115. The rule we have followed is not new. It was laid down by Chief Justice Pearson in *Braswell v. American Life Ins. Co.*, 75 N. C. 8, and has been uniformly followed in this state for the past twenty-five years.

But it is said this rule was intended to apply to "old line" companies, and not to mutual associations. Where is the essential difference in principle or in its practical result? Both companies pay back only what they have received with legal interest thereon, and neither company is permitted to retain anything for the cost of past insurance. If the mutual association receives less, it pays back less. If the "old line" company collects more than the actual cost of insurance, it pays back that much more, and loses its surplus as well as its cost of insurance.

⁴⁶⁹ As we see no reason to change our former judgment, the petition to rehear is denied.

Petition dismissed.

IN THE CASE AS REPORTED in 126 N. C. 971, ante, p. 700, 36 S. E. 352, two others were argued at the same time, and since they involved the same principles, were governed by the decision in the principal case. These cases were *Street v. Mutual etc. Life Assn.*, and *Hill v. Mutual etc. Life Assn.* In the last of these cases it appeared that the plaintiff was present by proxy when the illegal resolution was passed, but the court held that this did not affect the plaintiff's rights, adding: "It is quite common for members of an association to send their proxies by request to the secretary or president in order to permit a meeting to be held; but we cannot suppose that by any such formal act they intend to waive their vested rights, or to release the association from its contractual obligations."

The Effect of Changes in By-Laws of Beneficial Associations as Against Pre-existing Members.*

Amendment Must be Provided for in Contract.—Generally speaking, a benefit society cannot so amend its by-laws as to injuriously affect the contracts with its pre-existing members. While the power to pass by-laws carries with it a power to amend, pre-existing members can be bound by subsequent amendments only in so far as they are mere regulations, but they are not bound if the effect is to change their contracts in substance: *Northwestern Benevolent etc. Assn. v. Wanner*, 24 Ill. App. 357. Hence, the liability of such associations upon contracts with its members is to be determined by the by-laws in force at the time the contract was entered into: *Carnes v. Iowa etc. Assn.*, 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683. It is intimated in *Figure v. Mutual Soc.*, 46 Vt. 362, that it is incident to the very nature and purpose of a mutual benefit society "that it should have power to modify and change its by-laws so as to graduate its charities as experience and necessity may require," and in so doing it can bind pre-existing members. Such is certainly neither the correct nor the recognized rule, in the absence of a provision either in the constitution or by-laws, or in the policy issued to the member, allowing such amendment. And even in this Vermont case there seems to have been an express provision in the constitution permitting such subsequent amendments. In order to bind a member of a benefit society by an amendment to its by-laws made subsequently to his becoming a member, such power must be reserved to the society by the contract originally made with the member. And where neither the constitution nor by-laws of the association, nor the certificate of membership reserves such a power, a subsequent by-law which materially changes the contract with its member is not binding on him without his assent thereto: *Hobbs v. Iowa etc. Assn.*, 82

*REFERENCE TO MONOGRAPHIC NOTES.

Features of the law specially applicable to mutual or membership life or accident insurance: 52 Am. St. Rep. 513-577, especially pages 556-558.

Iowa, 107, 31 Am. St. Rep. 406, 47 N. W. 983; *Carnes v. Iowa etc. Assn.*, 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683.

If, however, the contract expressly reserves the right in the association to amend its by-laws, such amendment will be binding on its pre-existing members: *Covenant Mutual Life Assn. v. Tuttle*, 87 Ill. App. 309; *People v. Grand Lodge*, 32 Misc. Rep. 528; 67 N. Y. Supp. 330. Parties are undoubtedly competent to contract with reference to existing and future by-laws, and where a member of a benefit society agrees to be bound by subsequent amendments, his agreement will be enforced: See *Covenant Mut. Life Assn. v. Tuttle*, 87 Ill. App. 309; *Hale v. Equitable Aid Union*, 168 Pa. St. 377, 31 Atl. 1066; *Supreme Lodge K. of P. v. Knight*, 117 Ind. 489, 20 N. E. 479; *May v. New York etc. Soc.*, 14 Daly, 389; *Borgards v. Farmers' Mut. Ins. Co.*, 79 Mich. 440, 44 N. W. 856; *Poultney v. Bachman*, 31 Hun, 49. And where a member is bound by subsequent amendments he is usually bound, though he had no actual notice of the action of the association: *Montgomery County etc. Co. v. Milner*, 90 Iowa, 685, 57 N. W. 612; unless notice that action is to be taken is required by the constitution or by-laws: *Metropolitan etc. Acc. Assn. v. Windover*, 37 Ill. App. 170; affirmed, 137 Ill. 417, 27 N. E. 538. And where previous notice is required, presence at a meeting by proxy is not equivalent to such notice: *Metropolitan etc. Acc. Assn. v. Windover*, 37 Ill. App. 170; affirmed, 137 Ill. 417, 27 N. E. 538.

It must be clear, however, that the contract permits amendment which will affect pre-existing members. Such members are only bound by amendments which the association has power to enact: *Supreme Lodge K. of P. v. Kutscher*, 179 Ill. 340, 70 Am. St. Rep. 115, 53 N. E. 620; *Supreme Council v. Adams*, 68 N. H. 236, 44 Atl. 380. Ordinarily, the provision in a certificate of membership that the member will comply with the by-laws has reference solely to by-laws then in existence, and will not include those subsequently passed which affect the vital principles of the contract; *North-western Benev. etc. Assn. v. Warmer*, 24 Ill. App. 361; *Starling v. Supreme Council*, 108 Mich. 440, 62 Am. St. Rep. 709, 66 N. W. 340; *Bogards v. Farmers' Mut. Ins. Co.*, 79 Mich. 440, 44 N. W. 856. Where the power to amend by-laws was limited to matters not provided for in the constitution, a provision of the constitution in existence when a certificate of membership was issued could not be changed so as to offset such member against his consent: *Carnes v. Iowa etc. Assn.*, 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683. A mere provision in the by-laws that they may be amended does not authorize a substantial amendment that will affect pre-existing members: *Covenant Mut. Life Assn. v. Tuttle*, 87 Ill. App. 309. Though in *Hutchinson v. Supreme Tent*, 68 Hun, 355, 22 N. Y. Supp. 801, where the member in his application expressly agreed

that the constitution of the order should be a part of his contract, and the constitution provided that it might be amended, a subsequent amendment was held binding on such member. The present tendency of judicial opinion, however, would appear to be away from such a liberal construction of the right to amend by-laws so as to affect pre-existing members, and in favor of the view that an association to pass such amendments must clearly reserve the right in its contract with a member. Undoubtedly, it is a sufficient reservation of the right of the society to amend where the certificate of membership provides that a member shall be bound by the rules and regulations then in force, or that might thereafter be enacted, and the member upon receiving his certificate assents to such conditions: See *Covenant Mut. Life Assn. v. Tuttle*, 87 Ill. App. 309; *Fullenwider v. Royal League*, 180 Ill. 621, 72 Am. St. Rep. 239, 54 N. E. 485. But in *Hale v. Equitable Aid Union*, 168 Pa. St. 377, 31 Atl. 1066, where a benefit certificate was accepted subject to the right of the association to amend its constitution and by-laws, the court held that in so far as the contract consisted of something specifically agreed to between the parties at the time, and not necessarily a part of the constitution and by-laws, an amendment changing the contract was invalid. A mere provision of the charter that the association may make such by-laws as may be deemed advisable, will not permit an amendment modifying a contract already entered into: *Stewart v. Lee etc. Assn.*, 64 Miss. 499, 1 South. 743. And a general authority conferred upon the trustees of a benefit society to change its by-laws at pleasure does not empower them to adopt a by-law, against a member's protest, which limits the benefits his beneficiary is entitled to, where under former by-laws his beneficiary was entitled to more: *Pokrefky v. Firemen's Fund Assn.*, 121 Mich. 456, 80 N. W. 240. A simple voluntary association, by the articles of which no particular rights are given, but which provide that any member injured by fire shall be given such relief from its funds as should appear just and reasonable, may determine in each separate case whether a member is entitled to anything, and what amount of relief shall be given: *Torrey v. Baker*, 1 Allen, 120. It is frequently difficult to determine the precise facts upon which a decision is based, and the broad statements sometimes found in the opinions might indicate that under no circumstances could a benefit society amend a by-law so as to affect the rights of pre-existing members: See, for example, *Wheeler v. Supreme Sitting*, 110 Mich. 437, 68 N. W. 229. But the rules we have stated are of very general acceptance, though they have their limitations which are more or less well defined. These limitations we shall proceed to notice.

An Amendment, to be Binding, Must be Legal.—That is, the amendment must be one which the association has power to enact, and it must be enacted in a legal manner. Though a member agrees

to comply with all laws then in force, or that might thereafter be enacted, such a provision only relates to such laws as might lawfully be enacted: Supreme Lodge K. of P. v. Kutscher, 179 Ill. 340, 70 Am. St. Rep. 115, 53 N. E. 620; Supreme Council v. Adams, 68 N. H. 236, 44 Atl. 380; Sovereign Camp v. Fraley (Tex. Civ. App.), 59 S. W. 905. Hence, where the constitution provides that by-laws may be amended, providing all members had previous notice of the purpose to amend, an amendment is not binding on a pre-existing member who had no notice, though he was present at the meeting by proxy: Metropolitan etc. Assn. v. Windover, 37 Ill. App. 171; affirmed, 137 Ill. 417, 27 N. E. 538. In Sovereign Camp v. Fraley (Tex.), 59 S. W. 879, it was held that a benefit society, with power to organize subordinate bodies throughout the United States and Canada, could pass a valid by-law binding on pre-existing members at a meeting held outside the state in which it had its origin, since the interests of such an association require that its meetings should be held as near the membership as possible, and as the members were in many states the place of meeting was usually changed at each convocation of the body. In this respect such a society differs from an ordinary corporation.

Amendment Must be Reasonable.—The power to amend by-laws so as to bind pre-existing members is subject to an implied condition of being reasonable: Thibert v. Supreme Lodge, 78 Minn. 448, 79 Am. St. Rep. 412, 81 N. W. 220; Supreme Council v. Adams, 68 N. H. 236, 44 Atl. 380; Hibernia Fire Engine Co. v. Commonwealth, 93 Pa. St. 264; Smith v. Supreme Lodge, 83 Mo. App. 512. In Supreme Lodge v. Knight, 117 Ind. 489, 20 N. E. 479, it was said that an amendment would be valid and binding, unless it was shown to be so unreasonable as to be void. Whether a by-law is reasonable or not is a question solely for the court: Hibernia Fire Ins. Co. v. Commonwealth, 93 Pa. St. 264. The amendment must reasonably further the interests of all the members and be for the better accomplishment of the objects of the association: Grafstrom v. Frost Council, 19 Misc. Rep. 180, 43 N. Y. Supp. 266. Amendments may be reasonable as to future members on the ground that they assent thereto on becoming members, and unreasonable as to pre-existing members who have not given their assent to the modification of their contract: Thibert v. Supreme Lodge, 78 Minn. 448, 79 Am. St. Rep. 412, 81 N. W. 220. In this case, a member, at the time he became such, was entitled to written notice of the number and amount of assessments. This was amended without his knowledge or consent to the effect that assessments must be paid by a certain date without notice, and if not paid the member should stand suspended, and not entitled to his insurance benefits. This was held to be unreasonable, and not binding on a pre-existing member. An amendment which makes past acts of a member a bar to the right to benefits is void as

to a pre-existing member, because unreasonable, though the right to amend by-laws is reserved: *Grafstrom v. Frost Council*, 19 Misc. Rep. 180; 43 N. Y. Supp. 266; *Lloyd v. Supreme Lodge*, 98 Fed. 66. An amendment to a by-law, making suicide a defense to an insurance policy, was held to be unreasonable as applied to pre-existing members in *Smith v. Supreme Lodge*, 83 Mo. App. 512. A contrary doctrine prevails in some other states: See *Supreme Lodge v. La Malta*, 95 Tenn. 157, 31 S. W. 493; *Supreme Commandery v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Doughtry v. Knights of Pythias*, 48 La. Ann. 1203, 55 Am. St. Rep. 310, 20 South. 712; *Hughes v. Wisconsin etc. Ins. Co.*, 98 Wis. 292, 73 N. W. 1015; *Dornes v. Supreme Lodge*, 75 Miss. 466, 23 South. 191. A court, however, has no visitorial power in respect to the by-laws of a voluntary association. And an amendment by such an association of a by-law for the guidance of its own affairs, and which simply changes the regulations by which proof is to be made to the association of the right to relief, will not be declared invalid simply because it is unreasonable: *Kehlenbeck v. Logeman*, 10 Daly, 447. This rule applies only to voluntary associations and not to corporations. Such a distinction is recognized in the recent cases of *Conniff v. Jamour*, 31 Misc. Rep. 729, 65 N. Y. Supp. 317, and *Hess v. Johnson*, 41 App. Div. 465, 58 N. Y. Supp. 983. In this last case the court said: "In the case of *Caston v. Father Matthew etc. Soc.*, 3 Daly, 20, the defendant was a corporation, and the provision assailed was a by-law. Here the defendant is a voluntary association, and the provision is contained in its constitution, subscribed by the members. That constitution is the contract between the parties, and if its provisions are not illegal, immoral, or contrary to public policy, it must be upheld whether reasonable or not, for parties have the right to enter into unreasonable or unwise contracts so long as such contracts are not illegal and are fairly made. This is the distinction between the case of a voluntary association and that of a corporation." The rule of the principal case is undoubtedly supported by the weight of authority that "a mere general consent that the constitution and by-laws may be amended applies only to such reasonable regulations as may be within the scope of its original design." But the Illinois appellate court, in *Fullenwider v. Supreme Council*, 73 Ill. App. 321, the case being affirmed on appeal in 180 Ill. 621, 72 Am. St. Rep. 239, 54 N. E. 485, in upholding an amendment materially increasing the rate of assessment, said: "The law does not contemplate that the court shall interpose its judgment as against the honest judgment of the governing body selected by the parties to determine what would be or what would not be a reasonable rate of assessment."

Not Destroy Vested Rights.—It is elementary that if the rights of a member of a benefit society have become vested, they cannot

be impaired by an amendment to the by-laws without his consent. This is universally recognized: See *Stohr v. San Francisco Musical Fund Soc.*, 82 Cal. 557, 22 Pac. 1125; *Hobbs v. Iowa Mut. Ben. Assn.*, 82 Iowa, 107, 31 Am. St. Rep. 466, 47 N. W. 983; *Wist v. Grand Lodge*, 22 Or. 271, 29 Am. St. Rep. 603, 29 Pac. 610; *Supreme Lodge K. of P. v. Knight*, 117 Ind. 489, 20 N. E. 479; *Becker v. Berlin Ben. Soc.*, 144 Pa. St. 232, 27 Am. St. Rep. 624, 22 Atl. 699; *Supreme Commandery v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Poultney v. Bachman*, 31 Hun, 49; *Northwestern Ben. etc. Assn. v. Wanner*, 24 Ill. App. 357.

Whatever conflict there is in the cases upon this point arises from a difference of opinion as to what rights are vested and when they become such. If the original agreement between the association and a member contains no provision that the member shall be bound by subsequent amendments to the by-laws, the member's rights under such contract are vested, and cannot be divested or impaired by subsequent changes in the rules: *Hobbs v. Iowa Mut. Ben. Assn.*, 82 Iowa, 107, 31 Am. St. Rep. 466, 47 N. W. 983. On the other hand, if the contract provides that amendments may be made which shall be binding on pre-existing members, a member accepts his contract subject to this power of alteration, and his rights are not vested in the sense that they cannot be divested without his consent: *Stohr v. San Francisco Mus. Fund Soc.*, 82 Cal. 557, 22 Pac. 1125. As indicated by this case, a vested right as used in cases of this character is "a right which has become so fixed that it is not subject to be divested without the consent of the owner, as contradistinguished from rights which are subject to be divested without his consent." Certainly, a party has no vested right to have his contract remain unchanged, when the contract itself provides that it may be changed: See, also, *Supreme Lodge K. of P. v. Knight*, 117 Ind. 489, 20 N. E. 479. Benefits already accrued, for which the association has become liable, are vested so that they cannot be changed: *Becker v. Berlin Ben. Soc.*, 144 Pa. St. 232, 27 Am. St. Rep. 624, 22 Atl. 699; *Stohr v. San Francisco Mus. Fund Soc.*, 82 Cal. 557, 22 Pac. 1125; *Coyle v. Father Matthew etc. Soc.*, 17 Week. Dig. 17; *Gundlach v. Germania Mechanics' Assn.*, 4 Hun, 339. It must be clear, however, that the benefits have already accrued so that the member's right to them has become vested. So where upon becoming a member the by-laws of the society provided for the payment of certain weekly benefits to sick members, and subsequently this by-law was suspended, such a member who thereafter is taken ill cannot recover the sick benefits which were allowed at the time he became a member: *McCabe v. Father Matthew etc. Soc.*, 24 Hun, 149. And such a by-law might be amended after a member becomes sick so as to reduce the benefits to which he will be entitled. The amended by-law is not

given a retroactive effect in such a case, but simply applies to future weekly payments: *Poultney v. Bachman*, 31 Hun, 49; *Stohr v. San Francisco Mus. Fund Soc.*, 82 Cal. 557, 22 Pac. 1125. These cases establish the rule that a member does not, by becoming sick, acquire a vested right to the rate of weekly payments provided for by the by-laws as they then existed, but that such benefits may be changed after sickness has commenced, though not so as to affect payments which have become due before the change. That the right to the continuation of weekly benefits was not a vested right is clearly pointed out by the court in the last case cited: "Now, under the contract, nothing was due before the sickness actually took place. Benefits do not accrue for future sickness. The right of the plaintiff [the sick member] to benefits for future sickness is not different in its nature from the right of the well members to benefits for future sickness. In the one case, the members have a right to future payments in case they become sick; in the other, the plaintiff has a right to future payments in case he continues sick. And if there was no power to change the by-law in the one case, there was no power to change it in the other, which is equivalent to saying there was no power to change it at all. The cases where a specific sum becomes due upon the happening of a certain event, as upon death, are not like the present. In such cases an alteration in the contract cannot be made after the fact; for that would be to make that not due which had already become due." *Becker v. Berlin Ben. Soc.*, 144 Pa. St. 232, 27 Am. St. Rep. 624, 22 Atl. 699, might appear to be in conflict with these cases. It seems to hold that upon becoming sick a member acquires a vested right to the rate of weekly payments provided for by the by-laws as they existed at that time, and that as to him such benefits could not thereafter be reduced. The by-law in existence at the time he became sick, however, provided that he should receive the weekly allowance until a restoration to full health, or death. This language clearly distinguishes this case from the others cited, since at the time he became ill he acquired a vested right which could not be impaired. The language of the member's contract should be closely scrutinized to determine whether his rights are vested or not.

The question has arisen of the power of a benefit society to amend its by-laws after the death of a member, so as to reduce the amount of benefits which shall be paid to the member's beneficiary. Ordinarily, it would seem that if the rights under a policy of a benefit society could ever become vested, such vesting would take place upon the death of the member, and that the rights growing out of a membership certificate would be, after the death of such member who had fully performed his part of the contract, a debt or obligation on the part of the society which could not be repudiated. This was the view adopted by the New York supreme

court in *Gundlach v. Germania Mechanics' Assn.*, 4 Hun, 339, where the benefit society, after a member's death, sought by an amendment of its by-laws to reduce the amount of benefits which should be paid to his widow. The articles of association permitted amendment at any general meeting. The court held, however, that the association undertook by its contract to pay a member's widow after his death a stated monthly allowance, and that it could not, after such death, relieve itself from such obligation. A contrary rule was adopted in *Fugure v. Mutual Soc.*, 46 Vt. 362, where the association, after a member's death, decreased the amount payable to his widow, and the court in sustaining the reduction held that the widow, upon her husband's death, acquired no vested right to the amount then provided for by the by-laws. We question the soundness of this decision. It seems to sanction the right of a benefit society to repudiate its just obligations after they have been assumed.

May Not Radically Change Contract so as to Practically Destroy It.

An amendment of by-laws which so completely deprives a member of his rights as to amount to an absolute repudiation of the society's obligation will never be permitted, even under a general provision in a contract binding a member to all future changes in the by-laws. This rule was applied in a case where, after a member had appointed a stranger as his beneficiary, the by-laws were so amended as to require a beneficiary to be related to the member by blood, or to be a member of his family or dependent on him. It appeared that this particular member had neither family, blood relation, nor anyone dependent on him. It was, therefore, impossible for him to comply with the amendment, and the court held it not to be binding upon him: *Wist v. Grand Lodge*, 22 Or. 271, 29 Am. St. Rep. 603, 29 Pac. 610. In *Smith v. Supreme Lodge K. of P.*, 83 Mo. App. 512, it was held that any amendment of the by-laws which entirely changes the scheme of insurance and makes a radical departure from the original plan is an unreasonable exercise of the reserved power of amendment, and will not be binding on pre-existing members. A benefit society cannot by a by-law destroy the original plan of insurance and substitute some other and essentially different plan to the detriment of pre-existing members. The principal case recognizes that a mere general consent that the by-laws may be amended only applies to such reasonable changes as are in furtherance of the essential objects of the association, and that they must not be destructive of vested rights. Even the case of *Fugure v. Mutual Soc.*, 46 Vt. 362, admits that the amendment must not be fraudulent or against the interests of the association. And in *Supreme Commandery v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332, which sanctions the fullest power of amendment, the court said that "while a subsequent law, because of the assent of the member, may add new terms or conditions to

a certificate, terms or conditions reasonably calculated to promote the general good of the membership, and may be valid and binding. It does not follow that a law operating a destruction of a certificate, or a deprivation of all rights under it, would be of any force." There seems to be a tendency in some of the later cases to materially restrict the power of amendment in a benefit society as to pre-existing members, under a mere general agreement on the part of such member to abide by all present or future rules and regulations of the society. *Knights Templars' etc. Co. v. Jarman*, 104 Fed. 638, furnishes an example, where it was held that an amendment which materially lessened the value of a policy by reducing the amount of indemnity which the company promised to pay is not binding on pre-existing members. In commenting on the agreement of the member to abide by future by-laws, the court said that the member "probably foresaw that in course of time the company might find it expedient to make some changes in its method of corporate government, or in the mode of transacting its business, or in its rules of discipline; and he doubtless intended to assent to all amendments of the constitution and by-laws which were framed for that purpose, and would not deprive him of any substantial right or benefit secured by his policy. It is not reasonable, however, to suppose that he intended to agree in advance that the company might at any time reduce the promised indemnity to any sum which it found it convenient to pay. The liberal indemnity that was promised by the policy as first drawn may have been, and probably was, the inducing cause which led Jarman to become a member of the defendant company; and it would be unreasonable to infer that he intended to agree that, after he had paid assessments upon his policy for a period of years, the consideration that had induced him to pay the same might be withdrawn in whole or in part without his consent." In *Spencer v. Grand Lodge*, 22 Misc. Rep. 147, 48 N. Y. Supp. 590, where an amendment changing the class of beneficiaries was held not to apply to certificates already issued, the court said that a pre-existing member had paid for the privilege of naming whomsoever he pleased as his beneficiary, and to permit a subsequent change of this right was to sanction a radical change in the certificate, a dangerous power to be vested in a benefit society.

Amendments not Retroactive, Generally.—Even where a benefit society has reserved the power to amend its by-laws so as to affect the rights of pre-existing members, a new by-law or an amendment will not be interpreted to be retroactive in its operation, unless by its terms it is clearly intended to be so, but such law will be construed as operating only on cases that come into existence after it was passed: *Wist v. Grand Lodge*, 22 Or. 271, 29 Am. St. Rep. 603, 29 Pac. 610; *Knights Templars' etc. Co. v. Jarman*,

104 Fed. 638; *Ancient Order United Workmen v. Brown*, 112 Ga. 545, 37 S. E. 890; *Lloyd v. Supreme Lodge*, 98 Fed. 66; *Roberts v. Cohen*, 60 App. Div. 259; 70 N. Y. Supp. 57; *Spencer v. Grand Lodge*, 22 Misc. Rep. 147, 48 N. Y. Supp. 590; *Carnes v. Iowa etc. Assn.*, 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683; *Roxbury Lodge v. Hocking*, 60 N. J. L. 439, 64 Am. St. Rep. 596, 38 Atl. 693. Under this general rule for the construction of statutes which is held applicable to the laws of a benefit society or other private corporation, the effect of amendments to the by-laws of benefit societies has been materially limited, and the rights which pre-existing members supposed they had have been preserved. Laws of this character are said to be held in such great disfavor and to be so generally condemned, that courts will not give them a retroactive application, unless this intention is expressly declared or necessarily implied: *Wist v. Grand Lodge*, 22 Or. 271, 29 Am. St. Rep. 603, 29 Pac. 610. The mere fact that a member agrees to comply with all laws of the order which may be subsequently enacted in no manner alters the rule that such laws should be given a prospective operation, in the absence of a clear intent that they should act retrospectively: *Ancient Order United Workmen v. Brown*, 112 Ga. 545, 37 S. E. 890; *Wist v. Grand Lodge*, 22 Or. 271, 29 Am. St. Rep. 603, 29 Pac. 610. Unless there are imperative reasons which require a retroactive application of an amended by-law, it will not be given: *Knights Templars' etc. Co. v. Jarman*, 104 Fed. 638.

Notwithstanding this general rule for the interpretation of the laws of a benefit society, it has undoubtedly been held in numerous cases that where a member agrees to be bound by future by-laws, such by-laws have a retroactive application as to him because of his voluntary agreement: See *Bowie v. Grand Lodge*, 99 Cal. 392, 34 Pac. 103; *Stohr v. San Francisco Mus. Fund Soc.*, 82 Cal. 557, 22 Pac. 1125; *Supreme Commandery v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332.

Amendments Injuriouly Affecting Pre-existing Members.—We have already seen that amendments may be made to by-laws so as to affect pre-existing members, under a reserved power allowing such action, if the amendments are legal, reasonable, do not disturb vested rights, and make no radical change in the contract so as to practically destroy it. Within these limits, more or less vague though they are by reason of the different views which the courts take of them, the by-laws of a benefit society may be amended so as to injuriouly affect pre-existing certificates. The courts of some of the states, notably California, Alabama, and Illinois, have recognized in benefit societies the most extensive powers to amend their by-laws, though such amendment injuriouly affects pre-existing members, if the contract with such member clearly reserves the power of amendment. The consent of the member

renders the amendment binding. "Parties may contract," said the court in *Supreme Commandery v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332. "in reference to laws of future enactment—may agree to be bound and affected by them, as they would be bound and affected if such laws were existing. They may consent that such laws may enter into and form parts of their contracts, modifying or varying them. It is their voluntary agreement which relieves the application of such laws to their contracts and transactions from all imputation of injustice." This language was expressly approved in *Bowie v. Grand Lodge*, 99 Cal. 392, 34 Pac. 103. In *Robinson v. Templar Lodge*, 117 Cal. 370, 59 Am. St. Rep. 193, 49 Pac. 170, it was held that where the right to make amendments was expressly reserved, a pre-existing member could not complain of a particular amendment, although it might injuriously affect him. The fact that the burdens of such members are increased and his assessments raised does not invalidate a subsequent amendment: *Fullenwider v. Supreme Council*, 73 Ill. App. 321; affirmed, 180 Ill. 621, 72 Am. St. Rep. 239, 54 N. E. 485. The by-laws may be amended so as to reduce the prospective benefits to which the member or his beneficiary may become entitled: *McCabe v. Father Matthew etc. Soc.*, 24 Hun, 149; *Duer v. Supreme Council*, 21 Tex. Civ. App. 493, 52 S. W. 109; *St. Patrick etc. Soc. v. McVey*, 92 Pa. St. 510. In upholding such an amendment the supreme court of Indiana, in *Supreme Lodge v. Knight*, 117 Ind. 489, 20 N. E. 479, said: "We do not affirm that a benefit society may, by a change in its by-laws, arbitrarily repudiate an obligation created by a policy of insurance, but we do affirm that, where a change is regularly made in its by-laws, and the motive which influences the change is an honest one to promote the welfare of the society, and the members are all given an opportunity to avail themselves of the change, no actionable wrong is done the members or their beneficiaries. It may sometimes happen that the interests of one individual, or of a few individuals, may be impaired, but it is the right, and, indeed, it is the duty, of the society to protect the interests of the many rather than of the few. Persons who become members of such societies must take notice of this, and one person cannot, therefore, demand that the welfare of the society and the interests of the many be sacrificed for his sole benefit." A benefit society, however, under a reserved power of amendment, has no power to enact a retroactive amendment so as to render the policy forfeitable, or diminish the amount recoverable thereunder, because of acts done by the insured previous to its enactment. Hence, an amendment reducing the amount of benefits under a certificate if the member's death was caused or superinduced by the use of intoxicating liquors, has no application to a pre-existing mem-

ber if the disease which caused his death, and due to the use of liquor, became seated in incurable form prior to the enactment of the by-law: *Lloyd v. Supreme Lodge*, 98 Fed. 66. In conflict with the cases previously cited is *Knights Templars' etc. Co. v. Jarman*, 104 Fed. 638, where it was held that a benefit society could not amend its by-laws so as to materially lessen the value of a policy of a pre-existing member, by reducing the amount of indemnity which by its terms the company promised to pay, though the member in his contract had agreed to abide by any changes which might subsequently be made in the constitution or rules of the society. Cases relating to a change in the benefits payable to a sick member, or to a member's widow after his death, have been noticed elsewhere.

One who becomes a member of a benefit society upon the agreement that he will comply with all by-laws that were then in force and that might thereafter be adopted, is bound by a subsequent by-law that no member shall engage in certain prohibited occupations, and that if he does so he may be suspended from the society: *Loeffler v. Modern Woodmen*, 100 Wis. 79, 75 N. W. 1012. In this case at the time the plaintiff became a member liquor dealers and saloon-keepers were prohibited from becoming members. The plaintiff engaged in the prohibited business after he became a member, and thereafter the by-laws were amended providing for the suspension of members who engaged in the prohibited occupation. The plaintiff was held to be bound by the amendment. To the same effect is *Schmidt v. Supreme Tent*, 97 Wis. 528, 73 N. W. 22.

The weight of authority supports the rule that where the power of amendment is reserved in the association, a member is bound by a subsequent by-law which renders his policy forfeitable if he should commit suicide: *Daughtry v. Knights of Pythias*, 48 La. Ann. 1203, 55 Am. St. Rep. 310, 20 South. 712; *Dornes v. Supreme Lodge*, 75 Miss. 466, 23 South. 191; *Hughes v. Wisconsin etc. Ins. Co.*, 98 Wis. 292, 73 N. W. 1015; *Supreme Commandery v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Sovereign Camp v. Fraley (Tex.)*, 59 S. W. 879. Of course, such a by-law must be legally passed by the competent law-making authority of the association, or it is not binding: *Supreme Lodge v. Stein*, 75 Miss. 107, 65 Am. St. Rep. 589, 21 South. 559; *Supreme Lodge v. La Malta*, 95 Tenn. 157, 31 S. W. 493. And if the member has not consented to abide by future changes in the by-laws, the association cannot, by a subsequent by-law, forfeit any of his rights under his policy: *Morrison v. Wisconsin etc. Ins. Co.*, 59 Wis. 162, 18 N. W. 13; *Northwestern etc. Assn. v. Wanner*, 24 Ill. App. 357. If at the time a membership certificate is issued the by-laws declared the policy void if the member committed suicide

while sane, an amendment may subsequently be passed which will render a previous certificate null if the insured committed suicide while either sane or insane, instead of only while sane, as before prescribed, providing the power of amendment has been reserved: *Supreme Commandery v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Sovereign Camp v. Fraley* (Tex.), 59 S. W. 879. *Smith v. Supreme Lodge*, 83 Mo. App. 512, denies the right of a benefit society to make an amendment of this character so as to affect pre-existing members, even where such power has been reserved in the contract with such members, upon the ground that such an amendment is unreasonable and amounts to a radical change in the general scheme of insurance with reference to which the policy had been issued.

Amendment Benefiting Member.—In *Lavigneur v. L'Union Mutuelle De Bienfaisance*, 16 Rep. Jud. Quebec, C. S., 588, where a by-law was passed, increasing the amount payable to a beneficiary upon the death of a member, but no change being made in the rate of weekly assessments, it was held to apply to pre-existing as well as to future members. This decision seems to be placed upon the ground that to allow one class of members to receive greater benefits than another which pays equal assessments, would violate the principle of absolute equality which should reign among the members of such an association. The court also recognizes that the members would be bound by any new by-laws limiting their rights, and hence they ought to have the benefit of by-laws which increase their rights. If assent were necessary to render a by-law of this character binding, it would not be difficult to secure such assent.

Amendment Affecting Beneficiaries.—Generally speaking, a beneficiary has no vested right in a membership policy issued by a benefit society during the lifetime of the member, and nothing will prevent the society from so changing its by-laws as to permit changes of beneficiaries. As was said by the court in *Wist v. Grand Lodge*, 22 Or. 271, 29 Am. St. Rep. 603, 29 Pac. 610: "The laws of the society in respect to the changes of beneficiaries are for the protection of its own interests and welfare, and as against such laws the beneficiaries have no such vested rights or interest in the fund, during the life of the member, as will prevent the society from determining the course of such fund." In this respect a benefit or benevolent organization is different from an ordinary life insurance company, and a member may change his beneficiary from time to time as he sees fit if permitted by the laws of his society: *Wist v. Grand Lodge*, 22 Or. 271, 29 Am. St. Rep. 603, 29 Pac. 610; *Sabin v. Phinney*, 134 N. Y. 423, 30 Am. St. Rep. 681, 31 N. E. 1087; *Roberts v. Cohen*, 60 App. Div. 259, 70 N. Y. Supp. 57. Beneficiaries acquire their rights through the

members, and if the laws of the society under the contract entered into with a member permit amendments which shall affect beneficiaries, both the member and the beneficiary will be bound by any subsequent changes: *Supreme Lodge v. Knight*, 117 Ind. 489, 20 N. E. 479.

Hence, if a member contracts that he and his beneficiary will be bound by any laws which may be thereafter enacted, the contract is wholly within the control of the member, and the beneficiary is bound by any subsequent stipulations which bind the member: *Supreme Tent v. Hammers*, 81 Ill. App. 560. Such amendments are valid and binding if they are reasonable: *Wist v. Grand Lodge*, 22 Or. 271, 29 Am. St. Rep. 603, 29 Pac. 610. A change in the rule for determining beneficiaries is binding both on members and beneficiaries: *Bollman v. Supreme Lodge (Tex. Civ. App.)*, 53 S. W. 722; *Masonic etc. Assn. v. Severson*, 71 Conn. 719, 43 Atl. 192. A beneficiary is determined by the laws in force at the time of the member's death, and not by those existing when the member was admitted. And the rights of the beneficiary are not affected by an attempted testamentary gift of the fund to another person: *Masonic etc. Assn. v. Severson*, 71 Conn. 719, 43 Atl. 192. Where the by-laws at the time of a member's admission provide for the avoidance of a policy if the member commits suicide within one year, an amendment to the effect that the policy shall be avoided if the member commits suicide within five years is binding upon the beneficiaries of a previously issued policy: *Supreme Tent v. Hammers*, 81 Ill. App. 560. The amendment must not destroy the value of the policy, however. Hence, where an amendment provides that a beneficiary must be a member of the policy holder's family or a blood relation, it will not be applied to a previous member who has neither family nor blood relation and a stranger who has been previously named a beneficiary by such a member will not be affected by the amendment: *Wist v. Grand Lodge*, 22 Or. 271, 29 Am. St. Rep. 603, 29 Pac. 610. An amendment changing the rule relative to the naming of a beneficiary, like other amendments, will not be construed as retroactive so as to affect pre-existing policies unless such a construction is reasonably required by its terms. The policy of the law is said to be against such retroactive legislation: *Wist v. Grand Lodge*, 22 Or. 271, 29 Am. St. Rep. 603, 29 Pac. 610; *Roberts v. Cohen*, 60 App. Div. 259; 70 N. Y. Supp. 57. Hence, it has been held that an amendment changing the class of beneficiaries was not retroactive, in the absence of a provision in the amendment to that effect: *Spencer v. Grand Lodge*, 22 Misc. Rep. 147, 48 N. Y. Supp. 590; affirmed, 53 App. Div. 627, 65 N. Y. Supp. 1146. *Roberts v. Cohen*, 60 App. Div. 259, 70 N. Y. Supp. 57, might seem to conflict with the general rules stated above. It was held in this case,

reversing 32 Misc. Rep. 536, 68 N. Y. Supp. 949, that a benefit society had no power to amend its by-laws so as to change the rule as to the designation of beneficiaries, notwithstanding the member had agreed to comply with all regulations which might thereafter be enacted, and that a beneficiary named before such amendment and who was not changed prior to the death of the member was entitled to the benefits allowed by the policy. The decision may be upheld on the ground that the amendment was not retroactive, but otherwise its authority may be questioned. The intimation of the court that a benefit society must specifically reserve the power to amend with respect to the designation of beneficiaries, or such an amendment cannot be made so as to affect policies previously issued we do not believe has the support of the weight of authority, though there may be a tendency in some of the decisions to adopt such a view. Thus in *Spencer v. Grand Lodge*, 22 Misc. Rep. 147, 48 N. Y. Supp. 590, it was said that the member had paid for the privilege of designating his beneficiary, and that to allow this right to be changed without the consent of the member was to invest the association with a dangerous power.

COLLINS v. ASHEVILLE LAND COMPANY.

[128 N. C. 563, 39 S. E. 21.]

STREETS—DEDICATION OF—SALE OF LAND BY PLAT.

Where lots have been sold by reference to a plat representing a division of a large tract of land into subdivisions of streets and lots, the purchaser of a lot acquires a right to have all and each of the ways and streets on the plat kept open.

DEEDS—MAP OR PLAT—REGISTRATION.—A map or plat, referred to in a deed, becomes a part of the deed as if it were written therein, and is not required to be registered.

Bourne & Parker, for the plaintiffs.

Zebulon Weaver, for the defendant.

⁵⁶³ MONTGOMERY, J. The Southern Improvement Company, a duly organized corporation, received a deed in February, 1886, from J. M. Tiernan to a certain piece of land, adjoining the city of Asheville, and at once executed a mortgage upon the land to the Central Trust Company, of New York, as security for certain bonds. A sale was provided for in the mortgage in case of default in the payment of interest or principal of the bonds; and it was further provided that, until default, the Southern Improvement Company should have the

full right to contract for the sale or lease, subject to the ⁵⁶⁴ lien of the mortgage, of any of the lands at such prices and upon such terms as that company might deem fair and reasonable, and upon such sales the Central Trust Company would sufficiently convey by deed or deeds of release the lands so sold from the operation of the mortgage, so that the purchaser might get a title free from encumbrance, the proceeds of the sale to be paid to the trust company and to be used in purchasing the bonds at par with the accrued interest and to retire the same.

After the execution of the mortgage, and in the same year, the improvement company had the land laid off into city lots (numbered) and streets, and a plat thereof made, upon which certain portions were platted and distinguished as streets, and others as lots.

Afterward the improvement company offered the lots, exhibiting the plat at the same time, for sale, and did sell to various persons lots marked and numbered on the plat, and in the deeds the grantors made special reference to the plat, and the lots were described as abutting on certain named streets, and as being of certain numbers corresponding with the plat. The trust company, according to the agreement in the mortgage, executed releases to the improvement company for the lots so sold with recitals in each as to the mortgage, the agreement to release, and describing the lots in the releases in the same words as those in the deeds from the improvement company.

In 1892 the improvement company executed a second mortgage upon the unsold part of the same land to George S. Scott and Harris C. Fahnestock for the security of certain bonds, and in 1896, in a consolidated suit (the trust company and Scott and Fahnestock joining as plaintiffs), a decree of foreclosure was entered for the sale of the property, except those parts which had been sold off, the lots which had been sold to the plaintiffs in this action being among those excepted ⁵⁶⁵ in the decree. Fahnestock, who was a director of the improvement company, purchased at the foreclosure sale, and the sale was confirmed by the court. Fahnestock, after selling some of the lots represented on the plat and described as abutting on streets named on the plat, sold and conveyed to T. L. Durham all the property except the lots which had been sold off, and excepting also certain streets shown on the plat which he had made at the time of the sale to Durham. Durham afterward conveyed the property to its present owners, the Asheville Land Company, defendant in this suit. Durham and the Asheville Land Company knew at the time of their purchases of the existence of the plat made by

the Southern Improvement Company and of the sales made thereunder.

The principle of law involved in this case is, we think, the same as that in *Conrad v. West End etc. Land Co.*, 126 N. C. 776, 36 S. E. 282. The inconvenience and loss which may arise here from the enforcement of that principle of law will be greater than it was in that case, but that argument would not be allowed to influence us in our decision. The courts of the state in which the question before us has been presented and decided are divided. In some jurisdictions it has been held that where lots have been sold by reference to a plat representing a division of a large tract of land into subdivisions of streets and lots, like the one before us, the purchaser of a lot does not acquire a right of way over every street laid down upon the plat: *Pearson v. Allen*, 151 Mass. 79, 21 Am. St. Rep. 426, 23 N. E. 731. There the court said, in support of its position: "In *Regan v. Boston Gas Light Co.*, 137 Mass. 37, it was held that the defendant could close a whole series of streets on the plat, leaving open the private ways adjoining the plaintiffs' lots to the highway in one direction, and to the next side street in the other." In other courts it is held that a map or plat, referred to in a deed, becomes ⁵⁶⁶ a part of the deed as if it were written therein, and that, therefore, the plan indicated on the plat is to be regarded as a unity, and the purchaser of a lot acquires a right to have all and each of the ways and streets on the plat or map kept open. This view is so well and clearly stated in *Elliott on Roads*, section 120, that we quote it: "It is not only those who buy lands or lots abutting on a street or road laid out on a map or plat that have a right to insist upon the opening of a street or road, but where streets and roads are marked on a plat, and lots are bought and sold with reference to the map or plat, all who buy with reference to the general plan or scheme disclosed by the plat or map acquire a right to all the public ways designated thereon, and may enforce the dedication. The plan or scheme indicated on the map or plat is regarded as a unity, and it is presumed, as well it may be, that all the public ways add value to all the lots embraced in the general plan or scheme. Certainly, as everyone knows, lots with convenient cross-streets are of more value than those without, and it is fair to presume that the original owner would not have donated land to public ways unless it gave value to the lots. So, too, it is just to presume that the purchasers paid the added value, and the donor ought not, therefore, to be permitted to take it from them by revoking part of his dedication."

In *Conrad v. West End etc. Land Co.*, 126 N. C. 776, 36 S. E. 282, this court adopted the view that the purchaser had a right of way over all the streets designated on the plat, and that each and all of such streets must be kept open, and cited a case from each of the states of New Jersey and Oregon, in which the same principle had been adopted. We are not disposed, after careful consideration, to alter the decision made in that case. The matter of registration of the plat in *Conrad v. West End etc. Land Co.*, 126 N. C. 776, 36 S. E. 282, was mentioned, but we are satisfied that registration of the plat is not essential. Registration is only a means of publication of the plan ⁵⁶⁷ or scheme, and is not such an instrument as is required to be registered by the laws of this state. It is the offer of sale by the plat and the sale in accordance therewith that is the material thing which determines the rights of the parties. The defendant, the Asheville Land Company, had actual notice of the plat and sales thereunder made by the improvement company, and is, therefore, fixed with notice of the dedication of the streets. Besides, it had notice from the registration of the deeds from the improvement company to purchasers.

There is no error in the judgment of the court below, and the same is affirmed.

DOUGLAS, J., DISSENTED on the ground that the doctrine that where a tract of land is laid out in lots and streets and lots are sold upon the faith of the plat, the streets should thereafter be kept open, should be limited in its application to those streets which, if closed, would work a substantial injury to the purchaser. The dissent opposes the broad doctrine laid down by the prevailing opinion, "that if the owner of land divides it into lots and streets on paper and sells a single lot by the foot, he can never close a single street, even if it has never been opened, is never used by the purchaser of the lot, and does not affect in any way the value of his property." Justice Douglas points out that the decision in *Conrad v. Land Co.*, 126 N. C. 776, 36 S. E. 282, and the authorities there cited, upon which the prevailing opinion is founded, is confined to cases where the purchaser has suffered or is likely to suffer substantial injury, and cites as sustaining him the cases of *State v. Fisher*, 117 N. C. 733, 23 S. E. 158, and *Pearson v. Allen*, 151 Mass. 79, 21 Am. St. Rep. 426, 23 N. E. 731. The justice further adds that even granting that the plaintiff had some theoretical right to the use of streets he never expects to use, this infringement of his right would be injure sine damno, which the law would not redress, and says: "It is well settled that all such implied dedications operate by way of estoppel in pais, and

It seems equally well settled that there can be no estoppel where there is no actual injury. Neither is he entitled to injunction, for equity will grant an injunction only to prevent irreparable injury that cannot be compensated in damages."

THE DOCTRINE OF THE PRINCIPAL CASE seems opposed to *Pearson v. Allen*, 151 Mass. 79, 21 Am. St. Rep. 426, 23 N. E. 731. See generally, on dedications for streets and highways, the monographic note to *Whitesides v. Green*, 57 Am. St. Rep. 749-757.

CASES
IN THE
SUPREME COURT
OF
OHIO.

**ZANESVILLE v. ZANESVILLE TELEGRAPH AND
TELEPHONE COMPANY.**

[64 Ohio St. 67, 59 N. E. 781.]

CONSTITUTIONAL LAW.—THE DISTRIBUTION OF THE POWERS OF THE STATE, by the constitution, to the legislative, executive, and judicial departments, operates by implication as an inhibition against the imposition upon either of those powers which distinctively belong to the other.

CONSTITUTIONAL LAW—COURTS—JUDICIAL POWER, TEST OF.—The fact that a power is conferred by statute on a court to be exercised by it in the first instance in a proceeding instituted therein is itself of controlling importance, as fixing the judicial character of the power, and is conclusive in that respect, unless it is reasonably certain that the power belongs exclusively to the legislative or executive department.

COURTS — JURISDICTION — SUIT, WHAT COMPREHENDS.—The right to institute and prosecute a proceeding in a court comprehends the filing of a proper complaint, process for bringing in the proper parties, and a judicial inquiry according to the established rules of evidence and the practice of courts.

CONSTITUTIONAL LAW—COURTS—POWER CONFERRED BY STATUTE.—Where a statute confers a right and authorizes application to a court for its enforcement, the proceeding upon such application is the exercise of a judicial function, although the judgment authorized is of such a nature that it can only be performed, or its execution enforced, progressively through a future period.

MUNICIPAL CORPORATIONS — USE OF STREETS—RIGHT TO COMPENSATION.—A municipal corporation has no private proprietary interest in its streets which entitles it to compensation when they are subjected to an authorized additional public use by the construction of a telephone line thereon, beyond an amount sufficient to make the repairs rendered necessary by such additional use.

CONSTITUTIONAL LAW — COURTS — POWERS CONFERRED BY STATUTE.—The necessity for the existence of some tribunal authorized to hear and determine disagreements between municipalities and telephone companies, with respect to the mode of construction of lines in the public streets, being apparent, such authority may by statute be conferred upon the probate court.

C. G. Griffith, city solicitor, Durbin & McDermott, J. W. Warrington, W. M. Ampt, and E. G. Kinkead, for the plaintiff in error.

S. M. Winn, A. J. Andrews, Foraker Outcalt, Granger & Prior, for the defendant in error.

72 WILLIAMS, J. The judgment of reversal announced after the first hearing of this case was not the unanimous decision of the court, although no dissent appeared. The case having been more fully argued on the rehearing, and further considered by the court, is now for disposition as upon the original submission. The only question that has engaged the attention of counsel and the court on each of the hearings is whether that provision of section 3461 **73** of the Revised Statutes which confers jurisdiction on the probate court to direct the mode of constructing a telegraph or telephone line in the streets of a municipality when its authorities and the company are unable to agree, is repugnant to the constitution of the state; and the sole ground of the attack upon the constitutionality of the provision alluded to is, that the power it purports to confer on the court is purely legislative in character. It is a sound proposition that the distribution of the powers of the state, by the constitution, to the legislative, executive, and judicial departments operates, by implication, as an inhibition against the imposition upon either of those powers which distinctively belong to one of the other departments. But in classifying those powers and determining to which class various powers created by statute exclusively or properly belong difficulties are encountered, and many nice distinctions have been made. If the power here in question is such that it can be conferred on any judicial tribunal, there can be no doubt of the capacity of the probate court to receive and exercise it, by virtue of the constitutional provision which enables that court to take any jurisdiction, in any county, which the legislature may confer upon it: Art. 4, sec. 8. The statutory provisions which may aid in a determination of the nature of the power involved in this controversy are those contained in sections 3454, 3461-1, 3471, and

sections 3456, 3457, 3458, 3459, and 3461 of the Revised Statutes. These sections provide as follows:

"Sec. 3454. A magnetic telegraph company heretofore or hereafter created may construct telegraph lines, from point to point, along and upon any public road, by the erection of the necessary fixtures, ⁷⁴ including posts, piers, and abutments necessary for the wires; but the same shall not incommode the public in the use of such road."

"Sec. 3461-1. Any person or persons may be, and are hereby authorized to construct lines of electric telegraphs, from point to point, upon and along any of the public roads and highways, and across any of the waters within the limits of this state, by the erection of the necessary fixtures, including posts, piers, or abutments for sustaining the cords or wires of such lines; provided, that the same shall not in any instance be so constructed as to incommode the public in the use of said roads or highways, or endanger or injuriously interrupt the navigation of said waters; nor shall this act be so construed as to authorize the erection of any bridge across any of the waters of this state."

"Sec. 3471. The provisions of this chapter shall apply also to any company organized to construct any line or lines of telephone; and every such company shall have the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies."

"Sec. 3456. Any such company may enter upon any land, whether held by an individual or a corporation, and whether acquired by purchase or appropriation, or in virtue of any provision in its charter, for the purpose of making preliminary examinations and surveys, with a view to the location and erection of lines of magnetic telegraph, and may appropriate so much thereof as may be deemed necessary for the erection and maintenance of its telegraph poles, piers, abutments, wires, and other necessary fixtures, and for stations, and the right of way ⁷⁵ over such lands and adjacent lands sufficient to enable it to construct and repair its lines.

"Sec. 3457. No such company shall, without the consent of the owner thereof, in writing, enter a building or edifice, or use or appropriate any part thereof, or erect any telegraph pole, pier, or abutment in any yard or inclosure within which an edifice is situate, nor, in cases not provided for in section 3461, erect any telegraph pole, pier, abutment, wires, or other fixtures, so near to any edifice as to occasion injury thereto, or risk of injury, in case such pole, pier, or abutment be overthrown, nor injure or destroy any fruit or ornamental trees.

"Sec. 3458. When lands sought to be appropriated for lines of magnetic telegraph are held by a corporation incorporated under any law of this state, whether held by purchase or in virtue of any appropriation authorized by its charter or by any law of this state, the right of the company to appropriate such lands shall be limited to such use of the same as shall not, in any material degree, interfere with the practical uses to which the company is authorized to put such lands under its charter; and no such company shall erect poles, piers, abutments, wires, or other necessary fixtures in such close proximity to any other line of magnetic telegraph authorized by law to be constructed as to interfere mechanically with the practical working of such telegraph.

"Sec. 3459. The right of such company to use lands held by a railroad company, for the permanent structures of such telegraph, shall be limited to the land which lies within five feet of the outer limits of the right of way of the railroad company, where it is practicable to erect the line within those limits; when ⁷⁶ the company seeks to appropriate lands that lie beyond those limits, its petition must set forth the facts showing that it is impracticable to erect such line within said limits, and designate, either by a survey and map, or by reference to monuments, or by other means of easy identification, the place or places where the company seeks to establish the line; the probate court shall, in all instances, determine, if it be controverted by the railroad company, whether the erection of the line at the place or places designated will, in any material degree, interfere with the practical uses to which such railroad company is authorized to put such land; and if the court is satisfied that it will so interfere, it shall reject the petition, or require the structure to be erected at such other place or places as the court shall direct; but nothing in this chapter shall be so construed as to authorize any company to appropriate the use of the track or rolling-stock of any railroad company for the purpose of transporting poles, materials, or the employés of such telegraph company, or for any other purpose whatever."

"Sec. 3461. When any lands authorized to be appropriated to the use of a company are subject to the easement of a street, alley, public way, or other public use, within the limits of any city or village, the mode of use shall be such as shall be agreed upon between the municipal authorities of the city or village and the company; and if they cannot agree, or the municipal authorities unreasonably delay to enter into any agreement, the probate court of the county, in a proceeding instituted for the

purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley, or public way, so as not to incommode the public in the use of the ⁷⁷ same; but nothing in this section shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley, or public way beyond what may be necessary to restore the pavement to its former state of usefulness."

It may be observed at the outset that the effect of section 3471 is to place telephone companies on the same footing as telegraph companies, so that when the latter kind of company is mentioned in the other sections of the statute, the former is also included. And that, under sections 3454 and 3461-1, companies of either kind, when created, obtain from the state franchises to construct and maintain their lines, from point to point, upon and along any public road or highway, and across any of the waters within the state, by the erection of the necessary fixtures, including posts, piers, and abutments necessary for sustaining the cords or wires for such lines, subject only to the limitation that the lines shall not be so constructed as to incommode the public in the use of the roads and highways, or endanger or injuriously interrupt navigation. In order that such companies may fully enjoy the franchises thus granted them by the state, they are clothed, by section 3456, with the authority to appropriate any lands of individuals or corporations that are deemed necessary by the companies for the erection and maintenance of their poles, piers, abutments, wires, and other appliances, and the right of way over adjacent lands sufficient to enable them to construct and repair their lines. But this right of appropriation of private property for the use of such companies is subject to certain limitations prescribed in the subsequent sections, one of which, contained in section ⁷⁸ 3457, forbids the appropriation or use by such company, without the owner's consent, of any yard or inclosure within which an edifice is situated, or the erection of any pole or structure so near to any edifice as to occasion injury or risk of injury thereto, or so that it will injure or destroy any fruit or ornamental tree. Another limitation, which is contained in section 3458, restricts the right of the company in the appropriation of lands held by another corporation to such use of the same as will not in any material degree interfere with the practical use which the other corporation is authorized by its charter to make of such lands; and it forbids the construction of the company's line in such close proximity to another such line as to interfere,

mechanically, with the practical working of the latter. By section 3459 a restriction is imposed on the right of appropriation of property held by railroad companies, to the effect that there shall not be taken for any permanent structure any part of the railroad right of way that lies more than five feet from its outer limits, where it is practicable to construct the telephone or telegraph line within those bounds; and if it be claimed that is impracticable, the appropriation petition must state the facts showing it to be so. When the petition is controverted, the probate court is required, in all instances, to determine whether the line at the place proposed will, in any material degree, interfere with the practical uses which the railroad company is authorized to make of its right of way, and if satisfied it will so interfere, the court is empowered to reject the petition, or to require the telephone poles or structures to be erected at such other place or places as the court may direct. It may be well to notice here the nature of the power conferred on the probate ⁷⁹ court by this provision of the statute; for it is obvious that it is not different in nature from the power conferred by section 3461. It is essential that the rights of the two corporations, each holding separate franchises from the state, with respect to the uses which each are claiming of the same property, should be so adjusted that both may be able to carry out the purposes of their creation, and neither defeated in their objects by the conduct of the other. To accomplish that result, some impartial tribunal must be clothed with the power to hear and determine, on proper application, what mode of use by each company of the same property will enable both companies to carry on their business without obstruction by the other. Where, it may be asked, could that power be more appropriately lodged than in the tribunal in which the appropriation proceeding is had? And can it be any the less judicial in its nature because exercised by the court in the first instance, than it would be if resort were had to a court of equity to settle the dispute, after actual conflict between the two companies had arisen? If it is a judicial function to direct where the poles of a telephone line shall be placed in order to prevent interference with the proper use of a railway, it must be equally so to direct the mode of construction of the line in other respects so as to accomplish the same result, or so as to avoid unnecessary obstruction to the use of a public street. It may be said that the proceeding under this provision of the statute does not involve the exercise of any supervisory or administrative power belonging to municipal authorities. Neither does that under section 3461. That section

makes provision for all further appropriation proceedings that are necessary to the complete enjoyment by the companies of their ⁸⁰ franchises, by authorizing the condemnation of the easements appurtenant to property abutting on the public streets and ways, the owners of which are entitled to compensation for the new burden. And then follows the provision in question, designed, evidently, to furnish a competent tribunal, and provide a method of procedure, for the adjustment of any controversy between the company and the municipal authorities in regard to the mode of constructing the companies' lines in the streets, that being the only remaining step necessary to enable the company to enter upon the full use of its franchises. The provision is that "the mode of use" of the streets "shall be such as shall be agreed upon between the municipal authorities of the city or village and the company; and if they cannot agree, or the municipal authorities unreasonably delay to enter into any agreement, the probate court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley, or public way, so as not to incommode the public in the use of the same; but nothing in this section shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness." This is practically a provision for an appropriation proceeding against the municipality, and it is the only proceeding of that nature that is necessary against the municipal body in order to enable the company to make the needed uses of its streets. It will be noticed that it is not the right to use the streets that is made the subject of agreement between the company and the municipal authorities, or of determination by the ⁸¹ court. That right, as has been seen, is granted to the company directly by the legislature, and it is not made to depend upon any consent or agreement on the part of the municipality. It is only the mode of such use that becomes the subject of agreement or judicial determination. The power of eminent domain residing in the state, it has been held, under our present constitution, is committed to the control of the general assembly by the grant of legislative power, and it may be exercised by that body directly, or by agencies like private corporations, in such manner, under such conditions, and through such tribunals having capacity to receive the jurisdiction, as may be, by legislative enactment provided; subject, however, to the constitutional requirement that the property taken be for a public use,

and to the constitutional guaranty of compensation for private property so taken. A municipal corporation, though holding the fee in its streets, has no private proprietary right or interest in them which entitles it to compensation, under the constitution, when they are subjected to an authorized additional burden of a public nature: Lewis on Eminent Domain, sec. 119. Being charged with a public duty only, with respect to the streets under its control, including that of keeping them in repair, the compensation it is allowed to demand or receive for the use of its streets by a telephone company is expressly limited, by the provision of the statute under consideration, to "what may be necessary to restore the pavement to its former state of usefulness," where it is disturbed in the construction of the company's lines. This compensation, not being for any private property taken, may, without interfering with any constitutional restraint, be assessed by the court, without a ⁸² jury. Nor can there be any doubt that the use of property and of highways for the legitimate purposes of a telephone or telegraph company is a public use within the purview of the constitution, nor that the occupation of streets for those uses is consistent with their original design. Indeed, such companies have become indispensable business and social agencies, which materially relieve the public highways from use by the ordinary methods of travel, thus contributing to their convenience and safety. The statute contemplates that if the mode of using the public ways of cities and villages by telephone companies were left entirely to agreement between the council and company, the franchise of the latter might be made unavailable by the refusal of the former to negotiate with the latter, or by bona fide disagreement of the parties, a contingency not unlikely to occur; and hence the necessity for the provision of section 3461, now in question, by which jurisdiction is conferred on a competent court to determine the mode of such use by an order binding on both parties. Whether that provision be considered as strictly a part of the system established for making appropriations by such companies under the power of eminent domain, or as incidental and auxiliary thereto, it calls for the exercise of judicial functions of the same general nature.

The contention of those who contest the constitutionality of this statutory provision is, that the proceeding authorized by it, though not nominally so, is in reality an appeal from the action of the municipal council, a purely legislative body, the purpose of which is to invoke the exercise of powers by the

court of the same legislative character as those that have been exercised by, and properly pertain to, the ⁸³ council. This is an incorrect view of the statute. The proceeding is not an appeal from the council, either in substance or form. An appeal is the removal of a cause or matter from an inferior jurisdiction after its decision to a superior jurisdiction for retrial on its merits; and a proceeding in a superior jurisdiction cannot, with any propriety, be called an appeal where the cause or matter involved was not before any inferior tribunal or body. No action of the council, nor any matter within its cognizance, is brought before the probate court by the proceeding therein under the statute, for review or reconsideration. The council is given no power to direct in what mode the lines of a telephone company shall be constructed in the streets of the municipality. Its sole province is to come to an agreement with the company in regard to the mode of using the streets by the company. The making of such agreement between the parties is not involved in the proceeding instituted in the court, nor is its action in that regard in any way invoked. The jurisdiction conferred on the court is to determine the controversy between the disputant corporations, arising from their disagreement or failure to agree, by an order binding on both, directing in what mode the telephone lines shall be constructed in the streets and alleys, so as not to incommode the public in the use of the same. The method of calling this jurisdiction into exercise is not by appeal, and could not be so, for the reason already given, but, in the language of statute, is by an original "proceeding instituted for that purpose." The institution and prosecution of a legal proceeding in a court plainly comprehends the filing of a proper complaint, process for bringing the necessary parties into court, and judicial inquiry according ⁸⁴ to the usual rules and practice of courts. And this fact alone of conferring on a judicial tribunal in the first instance the power to act in a given matter is of controlling importance in giving judicial character to the nature of the power; though that is not necessarily a conclusive test, for, if it were, the existence of a statute would establish its validity; but it is decisive, in that respect, unless it is reasonably certain that the power belongs exclusively to the legislative or executive department. This court, in *State v. Harmon*, 31 Ohio St. 250, 259, approved of that principle, as stated by Selden, J., in *Cooper's Case*, 22 N. Y. 84, as follows: "The principle . . . obviously is, that where any power is conferred upon a court of justice, to be exercised by it as a court, in the manner and with the formalities used in its ordinary proceedings, the action

of such court is to be regarded as judicial, irrespective of the original nature of the power. The legislature, by conferring any particular power upon a court, virtually declares that it considers it a power which may be most appropriately exercised under the modes and forms of judicial proceedings."

In this important feature our statute is the opposite of the Connecticut statute which was held unconstitutional by the supreme court of that state in *Appeal of Norwalk St. Ry. Co.* (decided July 13, 1897), 69 Conn. 576, 37 Atl. 1080, 38 Atl. 708, which is cited, and chiefly relied on by the plaintiff in error to sustain its position with respect to the invalidity of our statute. The statutory provisions considered in that case are embraced in two sections, one of which was passed in 1893 and the other in 1895. The former provides that when any ⁸⁵ street railway company desires to lay its tracks, or any additional tracks, in the streets of any city, town, or borough, it shall make and submit a plan for laying its tracks, etc., to the mayor and common council of the city, the selectmen of the town, or warden or burgesses of the borough, who may adopt the same, or "make such modifications therein as they deem proper"; and that "no such company shall construct such railway or lay additional tracks" in the streets of such city, town, or borough except in accordance with a plan approved by such local authorities. The section contains the further provision that "the refusal or neglect of any such local authority to notify said company of its decision (on the company's application, within a specified time) shall be deemed to be a refusal to approve and accept said plan as presented by said company." The section adopted in 1895 provides that, when the local authorities named in the former section shall make or render any decision or order with respect to any matter relating to any street railway within their jurisdiction, the company may appeal therefrom to the superior court, or a judge thereof, "and said court or judge shall make such order in reference to said matter appealed from as may by it or him be deemed equitable in the premises." Then follows the further provision that whenever the local authorities named in the act of 1893, above referred to, shall thereunder "be deemed to have refused to approve or accept any plan presented by any street railway company, said street railway company shall have a like right of appeal therefrom to said superior court or any judge thereof; and said court or judge shall have the same powers, with reference to said plan and the acceptance or modification thereof, that said municipal ⁸⁶ authorities would have had under the provisions of said act, and may make

all such orders with reference thereto as may be deemed equitable." Perhaps it may aid somewhat in arriving at a clearer understanding of the decision in the Connecticut case referred to, to notice here that the act of 1895 provides for appeals in two distinct classes of cases, and that the powers conferred on the court or judge by the respective appeals are somewhat different. It first provides for appeals from any order or decision made or rendered by the municipal authorities, on the railway company's application, and the power conferred on the court or judge in that class of cases is simply to make such order in the matter so appealed from as the court or judge may deem equitable; then it makes separate provision for appeals from the neglect or refusal of the municipal authorities to act upon the application of the railway company within the required time, and in cases of that kind it is provided that the court or judge "shall have the same powers that the municipal authorities would have had" under the statute of 1893. It is this last provision, and that alone, by which it was attempted to confer on the court or judge all the powers of the municipal council, that, in the opinion of the supreme court of Connecticut, made the functions of the appellate court or judge so essentially and distinctively legislative as to render that provision invalid.

The other provisions of the statute, including that providing for appeals in the other class of cases, that is, from orders and decisions made and rendered by the council, in regard to which, as above shown, the statute does not purport to confer on the appellate court or judge the powers of the council, but limits the ⁸⁷ jurisdiction to the making of such orders as shall be deemed equitable, were held valid, and an appeal of that kind sustained, in *Central Ry. etc. Co.'s Appeal*, 67 Conn. 197, 35 Atl. 32. This case was not overruled by the later case of *Norwalk St. Ry. Co.'s Appeal*, 69 Conn. 576, 37 Atl. 1080, 38 Atl. 708, but was distinguished. In that part of the opinion in the last case which distinguishes the former one, the provision of the statute for appeals from orders and decisions of the municipal council, and the power thereby conferred on the court or judge, are referred to as follows: "The act of 1895 provides, among other things, that an aggrieved person might appeal from an order made by a municipal council in pursuance of the act of 1893; that such appeal should be by petition to the court, which should specifically state the portion of the order appealed from, and the reasons, and be served on the council, and that such appeal should be tried by the court, and appropriate judgment rendered." Then the learned judge, af-

ter giving the reasons for sustaining that provision of the statute and the appeal taken under it in the former case, proceeds to state the difference in the provision in question authorizing appeals when there is a refusal of the council to act, and in the nature of the power it purports to confer on the appellate court or judge, as follows: "But the act of 1895 goes further, and contains an additional provision, which is not fairly susceptible of being construed as merely providing for a process to bring into action the judicial power of the court, and which, without any action by a municipal council other than a failure to act within a limited time, purports to transfer to the court all the powers conferred on municipal councils by the act of 1893. The ⁸⁸ distinction between the two provisions of the act is vital." So that the real ground of that decision, holding invalid the statutory provision there in question, is that its purpose was to transfer to the appellate tribunal, to be exercised by it, all the legislative and administrative powers of the municipal council over the subject matter of the appeal. That principle has no application to our statute; for, as has been heretofore shown, the proceeding authorized by it is in no sense a substitution of the court for the municipal council, nor in the nature of an appeal from that body, nor does it transfer to the court, to be exercised by it, any power primarily conferred on that body, nor purport to do so. And, furthermore, whether the distinction made in the Connecticut case between the different provisions of the statute there considered be substantial or not, it is clear the proceeding under each provision is strictly an appeal, in the appropriate sense of that term, from a legislative body, on matters originally committed to it, which of itself is a feature of controlling influence in fixing the legislative character of the power conferred, and which is wholly lacking in our statute.

The reasonable limits of an opinion, already enlarged, will not permit a review of all the cases cited by counsel for the plaintiff in error. We have carefully examined them all, and find none of them more directly in point than the one just noticed, and none, we believe, are claimed to be so.

"It is certainly clear as a general rule," says Selden, J., in *Cooper's Case*, 22 N. Y. 84, "that whenever the law confers a right, and authorizes an application to a court of justice to enforce that right, the proceedings upon such an application are to be regarded as of a judicial nature." It is competent for the state, ⁸⁹ through its legislative department, to grant to telephone and telegraph companies organized under its authority,

the right to construct their lines in the streets of municipalities, and in the present instance the grant was so made. The inability or failure of the council to come to an agreement with the company in regard to the mode of using the streets for that purpose practically amounts to a denial of the company's right, the remedy for the enforcement of which is that provided by section 3461 of the Revised Statutes. The administration of that remedy does not involve the exercise of any continuing supervisory powers over the municipal or telephone corporation, nor the adoption or execution of administrative regulations for the government of either, but consists of an order made by the court in the usual manner of legal proceedings, after a hearing of the allegations and evidence of parties who are brought before the court by proper process.

It is necessary, no doubt, to specify in the order, with reasonable certainty, the mode of construction of the company's lines, so that they will not incommode the public in the use of the streets; and it is true that an order of that nature can only be performed, or its execution enforced in the future. But while orders of that description may be infrequent, they are not unknown to the courts. In *Pennsylvania v. Wheeling etc. Bridge Co.*, 13 How. 518, 626, the court, after the examination of plans submitted, and the hearing of expert and other evidence, entered its order directing the defendant to so change the construction of its bridge over the Ohio river, according to certain detailed plans and specifications therein set forth, as not to obstruct the navigation of the river. And other instances of like ⁹⁰ orders and decrees of courts may be found in the books. The case of *Canada Northern Ry. Co. v. International Bridge Co.*, 7 Fed. 653, was a proceeding in a federal court under an act of Congress which "authorized the construction and maintenance of a bridge across the Niagara river by the International Bridge Company, and provided that 'all railway companies desiring to use said bridge shall have and be entitled to equal rights and privileges in the passage of the same, and in the use of the machinery and fixtures thereof, and of all the appurtenances thereto, under and upon such terms and conditions as shall be prescribed by the district court of the United States for the northern district of New York, upon hearing the allegations and proofs of the parties, in case they shall not agree.' The Canada Southern Railway Company subsequently presented their petition under this act to the district court of the United States for the northern district of New York, and alleging that it had never been able to agree with the Inter-

national Bridge Company upon the amount of compensation which it should pay for the use of such bridge, prayed the court to determine and prescribe the terms and conditions upon which it might use the said bridge, together with the machinery, fixtures and approaches." The jurisdiction of the court was called in question on the ground that the power which the statute attempted to confer on the court was legislative, and not judicial. But the court held that: "A determination by a court, under the authority of a statutory enactment, in a case of disagreement, of the terms and conditions upon which a railway company should be entitled to the use of a bridge and its appurtenances, after hearing the allegations and proofs of the parties, is not an improper exercise of ⁹¹ the judicial functions; that it is no less the exercise of a judicial function to prescribe a rule of conduct, or protect the exercise of a right during a future period, than it is to determine whether the right has been invaded in the past; and that, when a statute refers the question of the conditions upon which an easement shall be enjoyed to a judicial tribunal for decision, after hearing the proofs and allegations of the parties, the implication is cogent that the decision shall proceed upon settled principles of law and equity, and not upon arbitrary discretion."

The necessity for the existence of some tribunal authorized to hear and determine disagreements between municipalities and telephone companies with respect to the mode of construction of the companies' lines in the public streets, is apparent, not only for the protection of the rights of the respective corporations, but also in the public interest, as conservative of peace and good order, and in securing to the public the full benefit of the service such companies are designed to afford, at those reasonable rates which always attend fair competition. And the best consideration we have been able to give this case has failed to satisfy us that the power conferred on the probate court by the statutory provision in question has been inappropriately bestowed. The argument to the contrary, thorough and able as it has been, at most has served to cast a doubt upon the validity of the provision, but that is not enough to justify the court in holding it unconstitutional. The judgment is therefore affirmed.

Burket, Spear, and Davis, JJ., concur.

Shauck, C. J., and Minshall, J., dissent.

JUDICIAL ACTION.—WHENEVER A POWER IS CONFERRED upon a court of justice, to be exercised by it as a court in the manner and with the formalities used in its ordinary proceedings, the action of such court must be regarded as judicial, irrespective of the original nature of the power: *State v. Noble*, 118 Ind. 350, 10 Am. St. Rep. 143, 21 N. E. 244. Infringement on the power of the judiciary by the legislature is discussed in *Denny v. Mattoon*, 2 Allen, 361, 79 Am. Dec. 784.

THE USE OF STREETS AND HIGHWAYS for telephone and telegraph lines and the right to compensation therefor is the subject of the monographic note to *Chesapeake etc. Tel. Co. v. Mackenzie*, 28 Am. St. Rep. 229-236. It has been held that a city may impose as a condition to laying a railway in its streets that the company shall pay a certain amount annually into the city treasury: *Chicago General Ry. Co. v. Chicago*, 176 Ill. 253, 68 Am. St. Rep. 188, 72 N. E. 880.

WABASH RAILROAD COMPANY v. FOX.

[64 Ohio St. 133, 59 N. E. 888.]

CONFLICT OF LAWS — ACTION FOR WRONGFUL DEATH.—To give a court in Ohio jurisdiction of a case brought by an administrator of a railroad employé to recover for his death, caused by the wrongful act in another state, it must, by force of the Ohio statute, be shown that such other state allows the enforcement therein of the statute of Ohio of similar character. It is not sufficient that the courts of such other state entertain actions for wrongful killing in another state.

CONFLICT OF LAWS — ACTION FOR DEATH BY WRONGFUL ACT.—If a statute of another state gives to the personal representative of one killed by the wrongful act of another a cause of action to recover in all cases in which the deceased could have maintained an action had he lived, and a later statute regulates the liability of corporations, other than municipal, for personal injuries to their employés, fixes the rules of evidence governing in such cases, and provides that the decisions and statutes of other states shall not be pleaded or shown as a defense, the two statutes must be treated as in *pari materia* in deciding whether, under the statute of another state, the laws of the first-named state allow the enforcement in its courts of the statute of the other state of similar character.

CONFLICT OF LAWS — ACTION FOR DEATH BY WRONGFUL ACT.—By force of the difference between the statutes of Indiana and of Ohio, the courts of the latter state have no jurisdiction to entertain an action by the personal representative of an employé against a railroad company, if the injury arose from the negligence of the company in the former state and death has ensued.

Smith & Beckwith, for the plaintiff in error.

E. L. Twing and Marshall & Fraser, for the defendant in error.

139 SPEAR, J. A question at the threshold of the case is raised respecting the jurisdiction of the Ohio court to entertain the action, objection being made that, by force of the statutes of this state and of Indiana, the courts of this state may not entertain an action by the personal representative of an employé against a railroad company where the injury arose from the negligence of the company in the latter state and death has ensued. It being conceded that the right of action rests wholly upon statutory law, not being authorized by the common law, consideration of the question involved here requires an examination of the statutes of the two states bearing upon the subject.

Section 285 of the Revised Statutes of the state of Indiana reads as follows:

"Sec. 285. [Action for death of another, limitation.] When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived against the latter for an injury for the same act or omission. This action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

The title of the Indiana act of March 4, 1893, known as the "employers' liability act," is as follows:

"An act regulating liability of railroads and other corporations, except municipal, for personal injury ¹⁴⁰ to persons employed by them, fixing the rules of evidence which shall govern in such cases, and providing that the decisions or statutes of other states shall not be pleaded or proven as a defense in this state; provided, further, that its provisions shall not apply to any injuries sustained before it takes effect, nor in any manner any suits or legal proceedings pending at the time it takes effect, and declaring an emergency. (Approved March 4, 1893.)"

Then follow provisions specifying the conditions under which the employé may recover of the company for injuries occasioned by its negligence, and, among others, where the injury is caused by the negligence of any person in the service of the company who has charge of a locomotive. Sections 3 and 4 of the act are as follows:

"Sec. 3. The damages recoverable under this act shall be commensurate with the injury sustained, unless death results from such injury, when, in such case, the action shall survive

and be governed in all respects by the law now in force as to such actions; provided, that where any such person recovers a judgment against a railroad or other corporation, and such corporation takes an appeal, and, pending such appeal, the injured person dies, and the judgment rendered in the court below be thereafter reversed, the right of action of such person shall survive to his legal representative.

"Sec. 4. In case any railroad corporation which owns or operates a line extending into or through the state of Indiana and into or through another or other states, and a person in the employ of such corporation, a citizen of this state, shall be injured as provided in this act, in any other state where such railroad ¹⁴¹ is owned or operated, and a suit for such injury shall be brought in any of the courts of this state, it shall not be competent for such corporation to plead or prove the decisions or statutes of the state where such person shall have been injured as a defense to the action brought in this state."

Section 6134 of the Ohio Revised Statutes is substantially similar to section 285 of the Indiana statute, quoted above, and for that reason need not be reproduced here.

It is established law in Ohio, however, that section 6134 does not extend to wrongful acts causing death outside of this state, and that prior to the passage of section 6134a of the Revised Statutes no action by an administrator for such cause could be maintained in our courts. That section, which was enacted May 21, 1894, reads as follows:

"6134a. [Right by statute of other state, territory, or country enforced.] Whenever death has been or may be caused by a wrongful act, neglect, or default in another state, territory, or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other state, territory, or foreign country, such right of action may be enforced in this state in all cases where such other state, territory, or foreign country allows the enforcement in its courts of the statute of this state of a like character; but in no case shall the damages exceed the amount authorized to be recovered for a wrongful act or default in this state, causing death. Every action brought under this act where the death has already occurred shall be commenced within one year from the passage of this act; and in all other cases, within the time prescribed for the commencement of such ¹⁴² action by the statute of such other state, territory, or foreign country."

It is apparent from this section that a condition to the right to maintain such action in this state, where the injury occurred

in another state, is that such state allows the enforcement of the statute of this state of like character; that is, if by the laws of such foreign state our statute will be enforced in an action based upon alleged death from negligence occurring in Ohio, then a party may maintain an action of like character here where injury was received in such other state; otherwise not.

It is apparent, also, that if section 4 of the act of Indiana heretofore quoted (the act known as the employers' liability act) applies to this case, then the statute of Ohio would not be given force in Indiana, for the specific provision is that in a suit brought by a citizen of that state an employé of a railroad company operating a line in that and another state, to recover for an injury inflicted in such other state, the corporation shall not plead or prove the decisions or statutes of such state as a defense. No such limitation upon the right of defense is to be found in any statute of Ohio.

It is insisted that this section does not apply because it relates to suits for injury by the employé only, and not to suits for death by a personal representative, as the case at bar; that is, it applies only to a case of violation of contract by the employer, and hence is simply declaratory of the common law that the law of the place where the contract is made governs. But, it is further insisted, if this were not so, that the wording of our Ohio statute does not prevent our courts from taking jurisdiction because the substance of it is that whenever a foreign state will ¹⁴³ entertain an action for death occurring in our state, then, by the clear provisions of section 6134a, the courts of our state will entertain like actions for death caused in such other state. And inasmuch as section 285 of the Indiana statute and section 6134 of our statute, each providing for a case of death, are similar, it is clear that the courts of that state would entertain an action for death occurring in this state.

It is difficult to disserve these Indiana statutes. They both relate to a recovery for an injury to an employé arising from the negligence of the company. That which gives a right of action to the representative where the employé does not survive gives such right under circumstances which would have given the employé such right had he survived, and in no other. That the right of the representative to maintain the action is predicated upon the right which the injured person would have had, and is no broader, is distinctly held in *Helman v. Pittsburg etc. Ry. Co.*, 58 Ohio St. 400, 50 N. E. 986. Hence, in order to determine whether the representative would have such right

of action against the company, recourse must be had to the employers' liability act to determine what conditions must obtain before the employé could maintain an action had he survived. The two, therefore, are in *pari materia*; they go together. This seems to have been the intention of the framers of the later act as expressed in section 3 by the provisions that the right of action, when death results, shall survive to the representative, and shall be governed in all respects by the law in force as to such actions which, of course, includes section 285. And, taking both the acts together, it seems plain that the test of liability against the company which the Indiana courts will recognize is ¹⁴⁴ found in the Indiana statute, and not in any Ohio statute or decision. In other words, Indiana law prevails; Ohio law is not considered. If, then, the later act is to be regarded at all in arriving at an understanding of the law of Indiana in a case of death, what warrant is there for excluding section 4 from consideration? The "suit for such injury," specified in the section, must mean any suit for such injury. It may be brought by the employé if he be alive, but if not, then his representative, under favor of section 285, may maintain the action; and if prosecuted by the injured employé to judgment, and that be reversed, and he die, then the action will survive to his legal representative. If the claim of defendant in error be correct, and this section is to be excluded from consideration in case death has ensued, let us see how it would result practically. A suit is brought direct by an employé injured in another state through which the interstate line passes, and as to his cause of action the section will prevent the company from setting up any decision or statute of the state where the accident occurred as a defense. Another suit for an injury to another employé, who by the same negligence was killed, is brought by his representative, and as to such cause of action no inhibition as to defenses exists. A similar condition would arise in case of a trial of a cause revived in the name of the representative after judgment in favor of the employé had been reversed. It seems not reasonable to conclude that the law-makers of our sister state intended any such discrimination as between one who is merely injured, and the widow and next of kin of one who was killed outright.

Nor is there ground for saying that our statute, section 6134a, is satisfied by the mere entertaining by ¹⁴⁵ the courts of another state of a cause of action for death occurring in our state. Such is not the language of the law. It is not the entertaining

of the suit that is stipulated for, but enforcement of our statute of like character. This means that it is the law of Ohio which the sister state will enforce; not necessarily the law of that state, for where there is an essential difference, as has already been pointed out, it cannot be said that by enforcing their own law the court of the other state is enforcing our statute. Our statute rests upon the ground of reciprocity which is based upon the idea of comity, and the very essence of reciprocity implies that each state, as to the subject matter, shall have and enforce identical laws; not simply provisions which may be in many respects similar, but in all essential particulars the same. It seems to us clear that the laws of Indiana, while they permit the bringing of actions in the courts of that state to recover for death occurring in another state, require the determination of the rights of the parties by the provisions of their own laws, but do not enforce the laws of the state where the injury was committed.

Attention is called by counsel for defendant in error to the case of *Pittsburgh etc. Ry. Co. v. Hosea*, 152 Ind. 412, 53 N. E. 419. We are unable to see that the decision aids their contention. It is true the court sustained an action against the company for death occurring in Kentucky, but it is equally true that the court was guided by the law of Indiana and enforced that law. Indeed, the reference to the subject of Kentucky law in the last paragraph of the opinion indicates that as the counsel had not argued in their brief whether the complaint should be determined by ¹⁴⁶ the laws of Kentucky or of Indiana, they had waived it.

But if the later act is to be wholly excluded from consideration, a result would seem to follow entirely fatal to the action, although on a different ground. The negligence complained of is that of a locomotive engineer. The deceased was a brakeman of another train. By the law of Indiana as it stood before the passage of the employers' liability act, the engineer was a fellow-servant with the brakeman; hence there would be no liability on the company for his acts: *Spencer v. Ohio etc. Ry. Co.*, 130 Ind. 181, 29 N. E. 915. So it would appear that plaintiff below was compelled to rely upon the act referred to as a part of her cause of action, and it was relied upon, for we find parts of the act set out in the petition.

The question of jurisdiction was properly made at the trial. We are of opinion that, under the laws of the two states applicable to the cause of action of the plaintiff below, that action cannot be maintained in an Ohio court, and that the

courts below erred in holding otherwise. This conclusion renders it unnecessary to determine the other assignments of error presented by the record and argued by counsel. The judgments below will be reversed, and inasmuch as the court of common pleas had not jurisdiction to entertain the action, final judgment of dismissal will be entered here.

Shauck, C. J., Burket and Davis, JJ., concur.

ACTION FOR DEATH—CONFLICT OF LAWS.—On the right to maintain an action in one state for injuries causing the death of a person in another, see *Ash v. Baltimore etc. R. R. Co.*, 72 Md. 144, 20 Am. St. Rep. 461, 19 Atl. 643; *Derr v. Lehigh Valley R. R. Co.*, 158 Pa. St. 365, 38 Am. St. Rep. 848, 27 Atl. 1002; monographic note to *Atrill v. Huntington*, 14 Am. St. Rep. 353, 354.

HENDERSON-ACHERT LITHOGRAPHIC COMPANY v. JOHN SHILLITO COMPANY.

[64 Ohio St. 236, 60 N. E. 295.]

SURETYSHIP—IMPLIED STIPULATIONS—RIGHTS OF SURETY.—There is an implied stipulation in the usual unconditional contract of suretyship that the principal will pay the debt at maturity, and thus protect the surety, and upon his failure to do so, the surety has the right to compel payment of the debt out of the principal's estate, although the surety has made no payment before the commencement of his suit.

SURETYSHIP—RIGHT OF JUDGMENT CREDITOR.—A creditor is entitled to subject to the payment of a judgment recovered on his debt any securities placed by the principal in the hands of his surety for its payment, or for his indemnity against its payment.

SURETYSHIP.—THE RIGHTS OF CREDITORS through subrogation to the remedy of the sureties can in no case exceed those of the latter. Until the indemnitor's covenant has been broken, or there has been some failure to perform it, no action can be maintained thereon by either.

SURETYSHIP—COVENANTS OF INDEMNITY—COVENANTS TO PAY—DIFFERENCE BETWEEN.—There is an essential difference, in legal effect, between covenants of indemnity and covenants to pay or assume a debt, as to the surety's liability thereon. A right of action accrues on those of the latter class as soon as the debt matures and is unpaid, while those of the former class are not broken, and no right of action accrues, until the indemnitee has suffered a loss against which the covenant runs.

SURETYSHIP—JURISDICTION TO ENFORCE COVENANTS OF INDEMNITY.—Neither a court of equity nor of law has jurisdiction to compel an indemnitor to perform his covenant

in advance of the happening of the contingency or event upon which by its terms it is to be performed.

SURETYSHIP — REPLEVIN — CONTRACT OF INDEMNITY—REMEDY.—A surety in replevin has no remedy, either at law or in equity, upon a contract to indemnify him against loss on account of his suretyship until such loss occurs, and the defendant in replevin who recovers judgment against the plaintiff therein is in the same position, although the surety and the judgment creditor are insolvent, and the judgment is uncollectible.

G. H. Wald and C. B. Wilby, for the plaintiff in error.

R. Ramsey, Kramer & Kramer, and Maxwell & Ramsey, for the defendant in error.

248 WILLIAMS, J. There appears to have been, at the trial, but one substantial controversy of fact, which was, whether Mr. Dawson, the superintendent of the defendant's store, had authority to, and did, enter into the agreement set forth in the petition in behalf of the defendant. The jury's determination of that controversy adversely to the defendant, though justified by the evidence, is not necessarily decisive of the case, which, as presented here, is reduced to an inquiry into the nature and effect of the agreement so made. The answer admits that the plaintiff, in an action brought by it against Belford, Clarke & Co., levied an attachment on personal property of that company then in the possession of the defendant here, of sufficient value to satisfy the demand which the plaintiff was there seeking to collect; and that, in the due prosecution of that action the plaintiff recovered judgment for the amount alleged in its petition in this case. It is also admitted that, while the attachment was a subsisting lien on the property it was replevined from the officer at the suit of the Book and Stationery Department Supply Company; and that the plaintiff here, who was made a defendant in that suit, recovered against the plaintiff therein a judgment for damages for the wrongful replevin of the property, in an amount equal to the judgment recovered in the attachment case. The evidence shows that, upon the replevin of the property, it was placed by the plaintiff in that suit, in the store of the defendant in this case, for sale on commission by the latter as agent of the former, who, in order to obtain sureties on the replevin bond, submitted to Mr. Dawson, then the superintendent of the defendant's store, the following written proposal:

249 "Jas. W. Dawson, Esq., Cincinnati, O.

"Dear Sir: We hereby authorize you to hold of the stock and mdse. now in the Book & Stat'y Dept. of the John Shillito Com-

pany so much in amount as will be necessary to guarantee George B. Fox or whosoever he may have sign bond, against any loss by being a party to the bond given or to be given in a replevin suit of this company vs. The Henderson-Achert Co., and to hold such stock and mdse. until such time as said Geo. B. Fox may notify you in writing that he does not desire any further guarantee.

Yours truly,

"BOOK & STATIONERY DEPT. SUPPLY CO.

"C. HIGGINS, Prest."

This proposal was accepted, and in pursuance thereof George B. Fox and another person became sureties on the bond, which was conditioned that the plaintiff in the replevin suit would duly prosecute the same, and pay all costs and damages that should be awarded against it. It was admitted on the trial that the sureties on the replevin bond, and the plaintiff in that suit were, and are, all insolvent; and that the defendant in this action did not, at the time of its commencement, nor since, have either property or money belonging to the plaintiff in replevin, all having been paid or turned over to the latter, or according to its direction, without the consent of the sureties on the bond.

The defendant's contract of indemnity so entered into no doubt inured to the benefit of the sureties who, upon the faith of it, incurred their obligation on the replevin bond, as fully is if made directly with them. And it is the contention of counsel for the plaintiff that, when its action was commenced, it was the right of ²⁵⁰ the sureties to enforce performance of that contract by compelling the defendant to discharge their obligation on the bond, and as that required the satisfaction of the judgment recovered in the replevin suit, the plaintiff is entitled to the same remedy through the process of subrogation, as here sought.

When not otherwise controlled by express agreement, there is an implied stipulation in the usual unconditional contract of suretyship that the principal will pay the debt at maturity, and thus protect the surety by relieving him from the burden of his obligation; and upon failure to do so, the latter had the right in equity, and now has by statute, to compel payment of the debt out of the principal's estate, though the surety made no payment before the commencement of his suit: *Stump v. Rogers*, 1 Ohio, 533; *Rev. Stats.*, sec. 5845. The creditor is undoubtedly entitled to subject to the payment of a judgment recovered on the debt any securities placed by the principal in the hands of the surety for its payment, or for his indemnity

against its payment. If the securities consist of tangible property that can be reached by execution, process of that nature is the appropriate remedy for their subjection to the satisfaction of the judgment; for the property, though in the hands of the surety, being the property of the principal debtor, is subject to seizure and sale like other property belonging to him, and its application to the payment of the debt and the consequent discharge of the surety's liability is in accomplishment of the purpose for which it was placed in his custody. Where the securities are choses in action, counter-bonds or mortgages given by the principal, for the collection of which and their application to the debt ²⁵¹ an action becomes necessary, the surety may resort to that remedy; and the creditor may oftentimes reach property of that nature in the possession of the surety, without the aid of subrogation, through a creditor's bill or proceedings in aid of execution. But as the money arising from such securities, however reached, properly belongs to the creditor for the security of whose debt they were intended, equity will aid him through subrogation to the remedies of the surety, which may prove the more effectual, because the creditor in that way becomes entitled to whatever priority of right exists in favor of the surety. This doctrine is sometimes said to rest upon the principle that a trust for the benefit of the creditor attaches to the property eo instanti it is placed in the possession of the surety, the execution of which may be enforced at the suit of the creditor, the *cestui que trust*. This was held in *Pendery v. Allen*, 50 Ohio St. 121, 33 N. E. 716, and has been in many cases, some of which are cited in the brief of counsel for the plaintiff. In other cases the doctrine is said to arise from that principle of natural equity which requires that his property, in whatever form it may be, who is ultimately liable for the payment of the debt, should be primarily applied to that purpose, in exoneration of the one who is only secondarily liable. Either view presupposes that the securities are placed with the surety, and are the property of the principal debtor. The doctrine has been applied, however, where a stranger to the debt, for a sufficient consideration, has agreed to assume and discharge the obligation of the surety. The creditor may adopt and enforce the promise, for it is the property of his debtor, and its performance includes the payment of the debt. Such being its purpose, a court ²⁵² of chancery will see that its design is fulfilled: *Champion v. Brown*, 6 Johns. Ch. 406, 10 Am. Dec. 343.

A distinction has been made between cases of that kind and those where the agreement is personal to the surety, for his in-

dividual indemnity only, and not for the discharge of his liability; courts in cases of the latter class holding that the creditor acquires no equity to enforce the covenant: *Homer v. Savings Bank*, 7 Conn. 478; *Taylor v. Farmers' Bank*, 87 Ky. 398, 9 S. W. 240; *Michigan State Bank v. Hastings*, 1 Doug. (Mich.) 225, 41 Am. Dec. 549; *Jones v. Quinnipiack Bank*, 29 Conn. 25. There are many other authorities to the same point, some of which are cited in the brief for the defendant. An attempt to define the precise scope of this distinction is a task that need not be assumed here further than to remark that it must depend, in each case, upon the terms and conditions of the covenant or contract of indemnity. For while the right of subrogation is not founded on contract, it is well settled that it may be qualified and controlled by express agreement of the parties; and in that respect their rights and obligations may be whatever, by their contract, they choose to make them. Contracts of that nature, like all others, are to be construed and enforced according to the intention of the parties, as derived from the language they have employed.

The contract between the defendant in this action and the plaintiff in the replevin suit was made by the former's acceptance of the latter's written proposal hereinbefore quoted; and that instrument fixes definitely and conclusively the terms and extent of the defendant's obligation of indemnity to the sureties on the replevin bond. That obligation as there expressed is "to guarantee" the sureties "against any loss by being a party to ²⁵³ the bond," and to hold the property then in custody of the defendant for that purpose, until such time as the sureties should give notice that they did "not desire any further guarantee." The apparent design of this last clause of the agreement was to provide the defendant with the means of fulfilling its obligation of indemnity. At all events, it does not enlarge nor diminish that obligation, which is to protect the sureties on the replevin bond against loss to them from their suretyship; for until such loss should occur it is entirely immaterial to them whether the property continue in the possession of the defendant or not, and it is not material then, since the defendant is, in either event, bound to make good the loss. The nature and extent of the defendant's obligation to the sureties was, therefore, unaffected by the surrender of the property, and of the money arising from the sales made, to the owner. If the property or its proceeds had remained in the possession of the defendant when the plaintiff recovered the judgment in the replevin suit, either could, undoubtedly, have been subjected to

its payment by legal process or proceedings. But that would have been, not through nor by virtue of any rights of the sureties, but by independent remedies belonging to the plaintiff as a creditor.

The plaintiff had no contract with the judgment debtor, nor with the defendant here, that the property placed in the possession of the latter should be held for the payment or security of the debt; nor did the latter bind itself to anyone to hold the property for such purpose. The defendant is a stranger to the debt, and its agreement is one strictly of indemnity to the sureties; so that its individual liability on the agreement, to enforce which this action was brought, ²⁵⁴ is in no sense a property right of the plaintiff's debtor, and satisfaction of the judgment obtained therefrom would not be payment out of the debtor's estate, but out of the estate of a stranger. Confessedly, therefore, the liability of the defendant on its covenant to indemnify the sureties against loss can be reached by the creditor, if at all, only through some right or remedy that belongs to the sureties. And it should be borne in mind that the defendant's obligation does not arise out of any principle of equity, but is created by special agreement of the parties. Except for its express agreement the defendant would have nothing to do with the liability of the sureties. That agreement, therefore, which alone created, must determine the extent of the defendant's liability, both at law and equity, for there is no principle upon which a court of equity or law can enlarge the legal effect of the agreement. It seems self-evident that the rights of the creditor through subrogation to the remedies of the sureties can in no case exceed those of the latter, and that, until the indemnitor's covenant has been broken, or there has been some failure to perform it, no action can be maintained thereon by either. This was declared in *Ohio Life etc. Co. v. Reeder*, 18 Ohio, 35, 47, and there is no diversity of authority on that subject.

There is an essential difference, in legal effect, between covenants of indemnity, strictly—that is, of indemnity against loss—and covenants to pay, or assume, or stand for, the debt, or a surety's liability thereon. A right of action accrues on those of the latter class as soon as the debt matures and is unpaid, because the liability then becomes absolute, and the failure to pay is a breach of the express terms of the ²⁵⁵ covenant. While those of the former class are not broken, and no right of action accrues, until the indemnitee has suffered a loss against which the covenant runs. This distinction grows out of the

express terms of the contract, and is well established by authority. It is expressed by Mr. Justice Swayne, in *Wicker v. Hoppock*, 6 Wall. 94-99, as follows: "In that class of cases [contracts of indemnity] the obligee cannot recover until he is actually damnified, and he can recover only to the extent of the injury he has sustained up to the time of the institution of the suit. But there is a well-settled distinction between an agreement to indemnify and an agreement to pay. In the latter case a recovery may be had as soon as there is a breach of the contract, and the measure of damages is the full amount agreed to be paid." That the distinction obtains at law, counsel concede. But it is insisted that a different rule prevails in equity, which, it is claimed, will entertain a suit for the specific performance of indemnifying covenants before a loss has been sustained, by compelling the payment or discharge of the surety's obligation, for his better and more complete exoneration. There is both reason and authority to sustain the proposition that a covenant, though by a stranger, founded upon a sufficient consideration, to pay, or to assume, or to stand for a debt on which a surety is bound, may be specifically enforced in chancery, after the maturity of the debt, if it be not then paid by the covenantor. The reason is, as has already been stated, that by his failure to pay he has failed to perform his covenant, and the remedy is within its express terms. The courts have many times so held. But on no sound principle can a court of chancery, any more than a court of law, compel an indemnitor to perform ²⁵⁶ his covenant in advance of the happening of the contingency or event upon which, by its terms, it is to be performed. Such a remedy would necessarily involve, not the enforcement of the contract made by the party, but its modification by the court, and its enforcement in that modified form.

It would not be profitable to enter upon an extended examination of the authorities touching this point. They have been reviewed in *Hoy v. Hansborough*, 1 Freem. (Miss.) 533; *Michigan State Bank v. Hastings*, 1 Doug. (Mich.) 225, 256 et seq., 41 Am. Dec. 549, and more recently in the case of *Central Trust Co. v. Louisville Trust Co.*, 100 Fed. 545, in each of which cases the existence of a remedy like that demanded in this case, on covenants on the same nature, was denied. In the last case above cited the general character of the contract of indemnity, and of the relief sought, but refused, were practically the same as in the case here under consideration; and in the opinion of the court it is said of the other two cases, which are there cited, that: "The covenants upon which the in-

demnitors were sued in each of the cases cited were simple covenants 'to save harmless and indemnify' against loss and damage, and were substantially identical with the covenant upon which this action was brought. In neither had any loss been actually sustained. A mere possible legal liability to pay was in both cases held to be insufficient to satisfy the terms of the bond, and in each case relief was denied upon the ground that the contingency provided by the bond had not arisen. The opinions are well reasoned, and most of the authorities now relied upon by counsel for complainant were considered and distinguished."

²⁵⁷ So in the case before us the defendant's covenant for the benefit of the securities on the replevin undertaking is one strictly of indemnity against loss on account of their suretyship, and nothing more; and as they have yet suffered no loss, no right of action has accrued to them thereon, either at law or in equity, and consequently none exists in behalf of the plaintiff.

Judgment affirmed.

Burket, Shauck, and Davis, JJ., concur.

Minshall, C. J., dissents.

A CONTRACT OF INDEMNITY, generally given to save harmless, gives a right of action only when the surety is actually damnified. If the principal has given to the surety a bond of indemnity merely, the surety must prove that he has been damnified. But where the contract is special, as that the principal shall pay a certain debt at a time specified, the surety has a cause of action when the principal defaults, even before he is called upon to pay as surety; *Note to Smith v. Simons*, 1 Am. Dec. 48. See further, *Ramsay v. Gervais*, 2 Bay, 145, 1 Am. Dec. 635; *Michigan State Bank v. Hastings*, 1 Doug. (Mich.) 225, 41 Am. Dec. 549; *Fletcher v. Edson*, 8 Vt. 294, 30 Am. Dec. 470; *Zuellig v. Hemerlie*, 60 Ohio St. 27, 71 Am. St. Rep. 707, 53 N. E. 447.

BRADY v. NATIONAL SUPPLY COMPANY.

[64 Ohio St. 267, 60 N. E. 218.]

CORPORATIONS—PLEADING EXISTENCE OF.—Corporation need not in its complaint aver its corporate existence. Such averment, if made, is immaterial, and a general denial to a petition so averring does not impose upon the plaintiff the burden to prove its corporate existence.

CORPORATIONS—ISSUE OF CORPORATE EXISTENCE, HOW RAISED.—If defendant desires to raise the issue as to whether the plaintiff is a corporation, he must specially plead and aver by answer that the plaintiff has no corporate existence, and has no right to contract or sue as a corporation.

CORPORATIONS — CORPORATE EXISTENCE, WHEN MUST BE PLEADED.—If a corporation is made defendant in an action, and its charter, powers, and franchises become the foundation of such action, they must be specially pleaded in the petition, and if the corporation is a foreign one, the name of the state by which, and the substantial terms in which, the charter, powers, and franchises were granted must appear in the petition.

C. F. Watts, for the plaintiff in error.

I. C. Taber, for the defendants in error.

269 THE COURT. “At common law a corporation, when it sues, need not set forth its title in the declaration; but if issue be taken, it must show, by evidence upon the trial, that it is a body corporate, having legal authority to make the contract which it seeks to enforce, if the action be upon contract, or to sue in that character and capacity in which it appears in court. . . . The code does not require the title of the plaintiff to sue to be more specifically set out than was required at common law”: *Smith v. Weed Sewing Machine Co.*, 26 Ohio St. 565.

It is, therefore, not necessary to aver in a petition that the plaintiff is a corporation, and if such averment is made in the petition it will not be held to be a material allegation, and will be regarded as mere surplusage, and a general denial to a petition containing such an averment will not impose upon the plaintiff the burden of proving at the trial that the plaintiff is a corporation. If the defendant desires to raise the issue as to whether the plaintiff is a corporation, he must specially plead and aver in his answer that the plaintiff is not a corporation, and has no right to contract or sue as such, as the case may be.

The same rule applies when a corporation comes in by way of cross-petition.

270 If, however, a corporation is made a defendant in an action, and its charter, powers, or franchises become the foundation of such action, the same must be specifically pleaded in the petition; and, if the corporation be a foreign one, the name of the state by which, and the substantial terms in which, the charter, powers, and franchises were granted should appear in the petition: *Devoss v. Gray*, 22 Ohio St. 159.

Judgments affirmed.

Minshall, C. J., Williams, Burket, Spear, Davis, and Shauck, JJ., concur.

PLEADING CORPORATE EXISTENCE.—In an action by or against a corporation, it is unnecessary to aver its corporate existence, except in cases where the action in its gist or substance involves the fact of corporate existence, in which event it must be alleged the same as any other fact: *Holden v. Great Western Elevator Co.*, 69 Minn. 527, 65 Am. St. Rep. 585, 72 N. W. 805. See, also, *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673.

STATE v. INTERSTATE SAVINGS INVESTMENT COMPANY.

[64 Ohio St. 283, 60 N. E. 220.]

LOTTERY.—CONTRACTS OF INVESTMENT DEBENTURES OR CERTIFICATES which by any device may be called in and redeemed at any period before they would regularly accumulate a credit in the reserve fund equal to the contracted endowment value, and otherwise giving unequal advantages to certificate holders, are unlawful as being lotteries.

LOTTERY.—CONTRACTS OF INVESTMENT DEBENTURES OR CERTIFICATES which cannot be expected to accumulate a reserve fund equal to the contracted endowment values within the period stated without aid from lapses or appropriations of premiums on new business constitute a lottery, and are unlawful as against public policy.

Petition in quo warranto to oust the defendant, the Interstate Savings Investment Company, from its corporate authority, franchises, and privileges. The defendant did business under accumulative endowment certificates issued in series called series A, B, C, and D. As each of these series of certificates is very similar in character, and all are open to the same objections, a copy of series A alone is here inserted, to enable the reader to understand the general scheme under which the defendant did business:

"SERIES 'A.'"

"The Interstate Savings Investment Company.

"General Offices, Cincinnati, Ohio.

"By this accumulative endowment certificate does promise and agree to pay _____ or order, upon surrender, redemption or maturity of this certificate, or, in the event of death, pay the owner's heirs, or legal representatives, the amount as shown in the table of values herein, and in accordance with the terms and conditions herein, and the application herefor, which are hereby made a part and parcel of this certificate as fully as if recited over the signatures hereto attached.

"In witness whereof, the said Interstate Savings Investment Company has, by its duly authorized officers, signed, sealed, and delivered, this contract this — day of _____, one thousand nine hundred —.

"[Seal]

S. A. STEVENS, President.

"[Seal]

WM. R. SYPHER, Secretary.

"TERMS AND CONDITIONS.

"Dues.—The dues on this certificate are twelve dollars per annum, but may be paid semi-annually, quarterly, or monthly. All dues after the first payment must be paid at the main offices or to some properly authorized collector of the company, between the hours of 9:00 A. M. and 5:00 P. M., on or before the fifteenth day of each month, beginning with the month following the date of this certificate.

"Fines.—An additional ten days of grace is allowed, with a fine of ten per cent, and if, at the expiration of the ten days, the fine and delinquent dues are not paid in full, the owner hereof forfeits all payments made hereon to the several funds to which they have been apportioned.

"Remittances.—All remittances made on this certificate are made at the risk of the owner. If any remittances hereon be mailed on the fifteenth or twenty-fifth days of the month, and if the date of mailing be verified by the postoffice stamp, then the certificate shall not be subject to fine or forfeiture. When the fifteenth or twenty-fifth falls on Sunday or a legal holiday, then the first business days respectively thereafter shall be regarded the same as the fifteenth and twenty-fifth of the month. No receipt for dues is valid without the signature of the treasurer, or of some one acting by his written authority.

"Apportionment of Funds.—The first six months' payment are passed to the credit of the reserve and expense funds. All subsequent monthly dues, when paid, are apportioned to the several funds as follows: Sixty-five per cent to the redemption

fund; twenty per cent to the reserve fund; and fifteen per cent to the expense fund. All fines and transfer fees are passed to the credit of the reserve fund.

"Nonforfeitable.—The monthly installments on this certificate, having been paid in full to and including the thirty-sixth month from the date of issuance hereof, shall render it nonforfeitable. Should the payment of dues on this certificate be continued after it had become nonforfeitable, it shall be considered a contributing, nonforfeitable certificate, and, if redeemed, shall be entitled to its endowment value, but should the payment of dues be discontinued at any time after the thirty-sixth month, it shall be considered a noncontributing, nonforfeitable certificate, and will not be eligible for the cash surrender privilege, but must be held to be paid by special redemption or maturity and when paid will be entitled to its paid-up value only, at the time it became noncontributing.

"Reinstatement.—Any nonforfeitable, noncontributing certificate can be reinstated as a contributing certificate by the payment of all back dues and a reinstatement fee equal to the accumulated fines, provided said certificate will not be reached by special redemption within one year, nor redeemed by regular redemption in the month in which the back dues are paid.

"Surrender Value.—Any time after one year, if this is a contributing certificate, the owner hereof may make application for its surrender value. If this certificate is one hundred and twenty months old or less, it will be paid out of the redemption fund, but if it is over one hundred and twenty months old, it will be paid out of the reserve fund its proportionate share of same, and the difference, if any, from the redemption fund. All dues must be paid until application is reached and paid. All cash surrenders have precedence over all other redemptions.

"Special Redemptions.—Not less than twenty per cent of the total amount contributed to the redemption fund is applied every month to redeem in consecutive order the lowest numbered certificates in force, paying for their surrender, if noncontributing, their paid-up value; or, if contributing certificates, their endowment value.

"Regular Redemptions.—The company reserves the right to call in and pay this certificate at any time previous to its maturity, by paying out of the redemption fund for its surrender, if a contributing certificate, its endowment value. If a noncontributing, nonforfeitable certificate, it is not eligible to the regular redemption. In no case are certificates eligible for redemption until they have been in force seven months. The

method used in this redemption is applied monthly and consists in paying certificates so many numbers apart, and in paying as many of them as the regular redemption fund will cover. The numbers of all certificates previously retired are not considered in the count.

"The numeral-apart is determined each month by taking a percentage of the total number of contracts in force. The percentage used shall be the same as published in the bulletin the previous month, and cannot be altered unless thirty days' notice has been given in the bulletin.

"Having determined the numeral, the count is begun with the oldest certificate in force (after the surrender and special redemptions have been made for the month), and continues through as many live certificates as the numeral indicates, the last one counted being the one called in for payment.

"Proceeding to count in like manner from the certificate so called in, the second one to be paid is reached; this method is continued until the sum of all the values of the certificates thus called in equals the amount in the regular redemption fund. The numeral for succeeding months is determined in the same way, and the count begins from the last certificate called in and paid the month previous.

"The directors reserve the right to modify this method of redemption at such a time, and in such a manner, as will in their judgment be to the best interests of all certificate holders.

"Loans.—At any time after the last day of the twelfth month from the date of this certificate, all monthly installments due hereon having been paid in full, the owner may make application for a loan, not to exceed its reserve credit. This certificate will be accepted as collateral to a note for a loan and must be deposited with the company. The loan may be made at the option only of the company, and from any of its loanable funds. If the owner fails to keep this certificate in force, then, in default of a monthly payment due hereon, it shall immediately become due and payable out of the regular redemption fund for its surrender value. From the proceeds of said redemption, the note, with all interest due thereon, shall first be paid; the remainder, if any, shall be paid to the owner, and the company shall be relieved from any other or further liability on this certificate, and the owner likewise shall be relieved from any further liability on this certificate, and the owner likewise shall be relieved from liability on his said note.

"Maturity.—This certificate, if a contributing one, will mature and will be paid from the reserve fund when the amount

to its credit in the reserve fund equals its endowment value, or if a noncontributing, nonforfeitable certificate, it will be paid when the amount to its credit in the reserve fund equals its paid-up value, at the time it became noncontributing.

“Transfer.—This certificate is transferable, but only on the books of the company. When a transfer is desired, fill out one of the assignment blanks on the back of this certificate, with the name of the person to whom it is to be transferred, written on the first line and the signature of the owner on the second line; then forward the certificate to the company to have the transfer recorded. A fee of one dollar is charged for the transfer of each certificate, and the fee must accompany the certificate.

“Death of Owner.—In the event of the death of the owner of this certificate, his legal representatives may, upon application within sixty (60) days after the date of death, avail themselves of any of the following options. All installments due hereon must be paid, according to contract, until the company has been notified which option has been accepted.

“1st. Continue the payment of monthly dues until this certificate is redeemed or becomes nonforfeitable.

“2d. Surrender the certificate at any time within six months from the date hereof, and receive in cash from the redemption fund the total amount paid hereon, exclusive of the first monthly payment.

“3d. Surrender this certificate at any time after six months from the date hereof, and if a contributing one, receive in cash from the redemption fund its paid-up value, or if a noncontributing certificate its paid-up value at the time it became noncontributing.

“Applications under options 2 and 3 are considered as surrender redemptions. All applications are considered in the order of their receipt, and are paid out of a fund consisting, according to requirements, of not more than sixteen per cent of the total redemption fund, for any one month.

“When deaths for any one month require more than the total amount appropriated for this purpose then those remaining unpaid are taken up in succeeding months in their regular order.

“Authority of Agents.—No promises, representations, or agreements of any agent or employé, not contained herein, shall be of any binding force or effect on the company; and no agent or employé has any authority to change or modify in any man-

ner whatever, the terms, regulations, conditions, or provisions of this contract.

"TABLE OF VALUES.

1	2	3	4	1	2	3	4
No. of months.	Cash sur-render value.	Death benefit and paid-up value.	Endow-ment value.	No. of months.	Cash sur-render value.	Death benefit and paid-up value.	Endow-ment value.
7		\$ 7 14	\$ 8 85	65	\$ 48 45	\$ 78 87	\$120 00
8		8 19	9 90	66	49 50	80 30	132 00
9		9 24	11 25	67	50 55	81 74	134 00
10		10 30	12 80	68	51 65	83 19	136 00
11		11 37	14 35	69	52 70	84 64	138 00
12	86 00	12 44	16 00	70	53 80	86 10	140 00
13	6 55	13 52	17 70	71	54 90	87 57	142 00
14	7 10	14 61	19 45	72	56 00	89 04	144 00
15	7 70	15 70	21 25	73	57 10	90 52	146 00
16	8 30	16 80	23 10	74	58 25	92 01	148 00
17	8 90	17 91	25 00	75	59 35	93 50	150 00
18	9 50	19 02	27 00	76	60 50	95 00	152 00
19	10 10	20 14	29 00	77	61 65	96 51	154 00
20	10 75	21 27	31 10	78	62 85	98 02	156 00
21	11 35	22 40	33 20	79	64 00	99 54	158 00
22	12 00	23 54	35 40	80	65 20	101 07	160 00
23	12 65	24 69	37 65	81	66 35	102 60	162 00
24	13 35	25 84	39 95	82	67 55	104 14	164 00
25	14 00	27 00	42 30	83	68 80	105 69	166 00
26	14 70	28 17	44 75	84	70 00	107 24	168 00
27	15 35	29 34	47 20	85	71 20	108 80	170 00
28	16 05	30 52	49 75	86	72 45	110 37	172 00
29	16 80	31 71	52 30	87	73 70	111 94	174 00
30	17 50	32 90	54 95	88	74 95	113 52	176 00
31	18 20	34 10	57 60	89	76 20	115 11	178 00
32	18 95	35 31	60 35	90	77 50	116 70	180 00
33	19 70	36 52	63 15	91	78 80	118 30	182 00
34	20 45	37 74	66 00	92	80 05	119 91	184 00
35	21 20	38 97	68 95	93	81 35	121 52	186 00
36	22 00	40 20	72 00	94	82 70	123 14	188 00
37	22 80	41 44	74 00	95	84 00	124 77	190 00
38	23 55	42 69	76 00	96	85 35	126 40	192 00
39	24 35	43 94	78 00	97	86 65	128 04	194 00
40	25 20	45 20	80 00	98	88 00	129 69	196 00
41	26 00	46 47	82 00	99	89 35	131 34	198 00
42	26 85	47 74	84 00	100	90 75	133 00	200 00
43	27 65	49 02	86 00	101	92 10	134 67	202 00
44	28 50	50 31	88 00	102	93 50	136 34	204 00
45	29 35	51 60	90 00	103	94 90	138 02	206 00
46	30 25	52 90	92 00	104	96 30	139 71	208 00
47	31 10	54 21	94 00	105	97 70	141 40	210 00
48	32 00	55 52	96 00	106	99 15	143 10	212 00
49	32 90	56 81	98 00	107	100 55	144 81	214 00
50	33 80	58 17	100 00	108	102 00	146 52	216 00
51	34 70	59 50	102 00	109	103 45	148 24	218 00
52	35 65	60 84	104 00	110	104 90	149 97	220 00
53	36 55	62 19	106 00	111	106 35	151 70	222 00
54	37 50	63 51	108 00	112	107 85	153 44	224 00
55	38 45	64 90	110 00	113	109 35	155 19	226 00
56	39 40	66 27	112 00	114	110 85	156 94	228 00
57	40 35	67 74	114 00	115	112 35	158 70	230 00
58	41 35	69 02	116 00	116	113 85	160 47	232 00
59	42 35	70 41	118 00	117	115 35	162 24	234 00
60	43 35	71 80	120 00	118	116 90	164 02	236 00
61	44 35	73 20	122 00	119	118 45	165 81	238 00
62	45 35	74 61	124 00	120	120 00	167 60	240 00
63	46 35	76 02	126 00	121	169 40	169 40	242 00
64	47 40	77 44	128 00	122	171 21	171 21	244 00

"In column 1, the number of months represents the number of dollars paid on certificate."

John W. Sheets, attorney general, J. E. Todd, Smith W. Bennett, and Swing, Cushing & Morse, for the plaintiffs.

Charles W. Baker, Michael G. Heintz, and Dwight Harrison, for the defendant.

Dyer, Williams & Stouffer, for A. W. Dorbert, a holder of debentures.

³¹⁷ DAVIS, J. The attorney general makes his contention for ousting the defendant from the privilege of doing business in Ohio on the provisions of certain contracts, or debentures, denominated by the defendant company "Accumulative Endowment Certificates," distinguished as series A, series B, series C, and series D. It is claimed that the defendant has misused its corporate franchises and privileges in issuing these debentures, because they are upon the face of them in contravention of law. It is insisted on the part of the relator that some, at least, of these debentures are vitiated by containing elements of chance and prize so as to constitute a lottery scheme, and that all of them are calculated to deceive and defraud an unsuspecting public. The question here is not whether the promoters of the defendant company have intentionally devised a scheme to mislead and defraud, but whether that is the effect of it. The promoters and the investors may be self-deluded, or satisfied to take the chances offered; but that does not alter the character of the scheme. If the company is misusing its corporate privileges in such way as to be a public abuse, the writ must issue regardless of the intent. Nor are we now called upon to draw the line of demarcation between such insurance and investment methods as have been approved by the law and the schemes now under consideration. We are ³¹⁸ not considering life insurance methods, tontine or other, building and loan associations, or investment companies in general. We are only concerned with the question whether the methods of this company are lawful or not. In this connection we recur to the averment in the answer to the effect that the defendant has literally complied with the requirements of an act of the legislature of Ohio "to regulate certificate bond and investment companies, partnerships, and associations other than building and loan companies, and to regulate investment guaranty companies, partnerships, and associations, doing business on the service dividend plan, and to protect holders of their certificates, debentures, and securities," and that the defendant has received from the secretary of state the certificates authorized by that act. If this

avermment was inserted in the answer with the understanding that compliance with the statute referred to legalized the financial schemes now under consideration, it is based on an erroneous theory. The legislature is presumed to have contemplated that a corporation thus authorized to do business in this state would exercise its franchises within chartered limits, and in a manner not injurious to the public: *Leslie v. Lorillard*, 110 N. Y. 531, 18 N. E. 363; *People v. North River Sugar Refining Co.*, 121 N. Y. 582, 18 Am. St. Rep. 843, 24 N. E. 834. This law was enacted expressly to regulate bond and investment companies and to protect the holders of their certificates. The legislature could not, and did not assume to, exercise judicial power by declaring that acts or contracts of such companies which are inherently immoral and prejudicial to the public welfare or unconstitutional should be lawful. Nor did the legislature undertake to declare public policy in regard to bond and investment companies further than that ³¹⁹ they should be regulated and that the holders of their securities should be in some measure protected.

It would serve no good purpose to detail the processes by which we have reached our conclusions after having carefully considered all of the elaborate arguments which have been submitted. An inspection of the different classes of "accumulative endowment certificates" issued by the defendant discloses that in none of them does a certificate absolutely and certainly mature within any fixed and definite period; yet the certificates are all so drawn as to create the expectation, and to make it appear, that they will mature in a period of one hundred and twenty months. With all the light which we have received from counsel and other sources, we have been unable to persuade ourselves that the credit, to any of these classes of certificates, in the reserve fund, or in the reserve and tontine funds, will equal the endowment value within the stipulated periods, without the aid of lapses or the apportionment of funds derived from new business. Indeed, it is almost self-evident that with seventy-five or eighty per cent of the premiums received consumed in expenses and monthly redemptions, the reserve credits could not equal the endowment value in several times the periods stipulated. In other words, twenty or twenty-five per cent of the premiums, with its interest earnings, alone and unaided by lapses or the appropriation of money from premiums received for new business, will not sufficiently accumulate to equal the represented endowment value in the stipulated periods. A little calculation applied to the representations in any of these tables of values will demon-

strate this proposition. If this deficiency in the reserve should be made up by appropriating premiums received on new business, it is obvious ³²⁰ that in redeeming the old obligations new and greater ones are created, making the possibility of ultimate redemption of all the obligations still more problematical. But if the deficiency should be made up by lapses or forfeitures, it is equally clear that the lapses must be very numerous—so numerous, in fact, as to eventually destroy the credit of the company and bring ruin upon it. A scheme which can succeed only by lapses is manifestly a scheme which will enrich some at the expense of others who embark in the same enterprise. It holds out the inducement that those who may be strong enough to survive will find their profit in the weakness, the misfortunes, and the discouragements which cause a larger number of their associates to fall by the way. Moreover, since the salvation of the company depends on these lapses, it necessarily tends to encourage and produce them. True enough, all of these certificates are nonforfeitable after thirty-six monthly payments, but that only signifies that a larger number must fail in the first three years, or that the whole scheme must fail, for the vice of the plan is, not that some may fail, but that many must fail in order that all continuing certificates shall mature. Formerly the profits from this source to life insurance companies were understood to be very large, and public attention being drawn to it, in many of the states laws regulating the nonforfeiture of policies were enacted; and such has been the force of public opinion, and public policy as expressed in these statutes, that it is believed that no standard company can be found which counts upon lapses as a necessary element in determining its ability to carry out its contracts; and all such companies so calculate as to carry out ³²¹ their contracts even should no lapses occur, except, perhaps, in some forms of tontine insurance. Indeed, there is no fixed rate or percentage of lapses which can be used as a basis of calculation. The percentage of lapses varies with different companies, and at different times with the same company. Shall this fallacious and uncertain element, which has thus been in so large a measure eliminated from legitimate business methods, be encouraged to reappear and to delude the inexperienced and the unwary? We cannot conceive it to be our duty to lend such encouragement.

But wherein is the chief attraction held out to the public by the defendant? In series A the certificates, or rather some of them, are liable to be matured fortuitously at periods more or less extended from the time of their issue. This is done by

taking a percentage of the total number of contracts in force each month. This percentage, it must be observed, will be as variable and uncertain as the contingencies of business will make it. The numeral being thus determined the certificates are arbitrarily matured by beginning the count "with the oldest certificate in force (after the surrender and special redemptions have been made for the month), and continued through as many live certificates as the numeral indicates, the last one counted being the one called in for payment. Proceeding to count in like manner from the certificates so called in, the second one to be paid is reached; this method is continued until the sum of all the values of the certificates thus called in equals the amount in the regular redemption fund." Turning now to the table of values in series A, we find that if a certificate is so redeemed at the end of twelve ³²² months the holder will receive four dollars more than he has paid—that is, sixty-six and two-thirds per cent per annum simple interest on his investment for an average of six months. If a certificate should be redeemed at the end of twenty-four months, the holder's profit would still be sixty-six and two-thirds per cent per annum upon his investment for an average of twelve months. If a certificate should be redeemed at the end of thirty-six months, the holder's profit would still be sixty-six and two-thirds per cent per annum upon his investment for an average of eighteen months. From this point, the point at which the certificates become nonforfeitable, the percentage of profit decreases until at the one hundred and twentieth month it has gone down to twenty per cent per annum simple interest on an investment of one hundred and twenty dollars for an average of five years. The rate of profit being unequal, the prize in this scheme is a large profit and quick return to the fortunate holder of a certificate selected for redemption, and the gaming chance is that his certificate will be called in for early redemption by the "numeral-apart" system of selection. Yet in face of all this counsel ask: "How can a scheme be a lottery in which there are no blanks and all investors for the payment of the same sums receive the same prize?" The blanks are all the numbers included in the extent of the "numeral-apart," except the last one, which draws a prize, and the prize is pointed out above. Our conclusion is that series A is a lottery and unlawful, and that none of the schemes of defendant as shown in certificates of series A, B, C, and D, will legitimately "finance out," as represented. It follows that the demurrer to the answer should be sustained and that the prayer of the relator should be granted.

323 It should be added as the opinion of the whole court that it is the duty of the state treasurer to hold and distribute the fund deposited with him, in trust for the holders of the debentures in this state, according to the amount that may be found due to each one.

Judgment of ouster.

Minshall, C. J., Williams, Burket, and Spear, JJ., concur.

ON WHAT ARE LOTTERIES, see the monographic note to *Yellowstone Kit v. State*, 16 Am. St. Rep. 42-48. For dealings in foreign government bonds that amount to lottery transactions, see *Ballock v. State*, 73 Md. 1, 25 Am. St. Rep. 559, 20 Atl. 184.

HUTCHINSON v. STRAUB.

[64 Ohio St. 413, 60 N. E. 602.]

MORTGAGES—PLEDGE OF RENTS.—Rents of land accruing after an assignment for the benefit of creditors, and after the assignee has taken possession, belong, as between general creditors and a mortgagee claiming under a mortgage of the land pledging the rents, to the latter when necessary to pay the debt secured by the mortgage.

MORTGAGES — BUILDING ASSOCIATIONS — FORFEITURE OF MEMBER'S STOCK.—If, in a proceeding brought by an assignee for authority to sell land, a building association, the mortgagee of such land, files an answer and cross-petition, such action is not an election to forfeit the stock of the mortgagor, nor does it estop it from claiming fines for the nonpayment of dues accruing after the assignment.

F. Brandon and G. A. Burr, for the plaintiff in error.

Gorman & Thompson, for the defendants in error.

414 SPEAR, J. It is conceded that the mortgage of the assignor and her husband to the company is a valid lien and is the first lien. The question is simply one of amount. The controversy centers about the claim of the company for rents of the property accruing and received by the assignee after the assignment and prior to the sale, and to fines for nonpayment of dues and premium up to the date of the sale. From the record it appears that the mortgage is of the usual building association form. It contains the following provision, viz.:

"Katie M. Straub and John W. Straub, in consideration of three thousand five hundred dollars, the value of seven shares

of its capital stock to them paid by the St. Bernard Loan & Building Association Company, a corporation under the laws of Ohio, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey to the said the St. Bernard Loan & Building Association Company, its successors and assigns, the following real estate, viz.: [description of property same as in petition.] And all estate, right, title, and interest of the said Katie M. Straub and John W. Straub, either in law or in equity, of, in, and to the said premises, together with all the privileges and appurtenances to the same belonging, and all the rents, issues, and profits thereof; provided, nevertheless, that if said Katie M. Straub, who has become a member of said company, and has subscribed for — share therein, to be paid in weekly installments of fifty cents per share, and has received in advance from said company said sum of three ⁴¹⁵ thousand five hundred dollars, the value of said shares, shall pay or cause to be paid to the said the St. Bernard Loan and Building Association Company, according to its constitution and by-laws, and without demand therefor, the following sums of money from the date hereof, until such time as the dues paid in, together with dividends credited, shall amount to said sum of thirty-five hundred dollars, in the following manner." Then follow stipulations for payment of weekly dues, for interest on the loan payable weekly, for premiums on the shares payable weekly, and payment of fines, assessments, and penalties incurred or levied in accordance with the constitution and by-laws.

It was held by the court below that the rents collected by the assignee should be paid, so far as necessary to satisfy it, upon the mortgage, and that the company was also entitled to collect fines to the day of sale, and these conclusions are assigned as error.

1. As to the rents the contention is based upon the proposition that the mortgagee's interest is personal merely, the mortgagor remaining the real owner of the property and entitled to possession subject only to the mortgagee's right to foreclose, and hence the mortgagee is not entitled to rents and profits until he has taken actual possession himself, or constructive possession by a receiver, and an assignee is not such receiver; that the company's case is not helped by the fact that the mortgage included the rents as well as the land because the assignment carried the right to rents to the assignee for the benefit of general creditors, and the only way the company could have reached the rents was by the commencement of a foreclosure suit, and the appointment of a receiver, and that it could not do after the

assignment since the ⁴¹⁶ probate court acquired exclusive jurisdiction over the land.

The contention is plausible, but we think it is not sound. To assume that the assignment carries to the assignee the right to future rents as against the mortgagee is to take for granted the very matter in controversy. It is to ignore an essential, and, as we think, a controlling, condition of the mortgage, viz., the pledge of the rents, issues, and profits. True it is, that ordinarily, the mortgagor has the right to receive as his own the rents of the real estate so long as he remains in possession. But the mortgagor in this case yielded possession to one who took the property burdened with the duty to administer it for the benefit of creditors, and then the question ceased to be one between the mortgagor and the mortgagee exclusively, and became a question between creditors themselves. The question then is, Who, among the creditors, has the first right? Those who have general claims only or one who has not only a general claim, but a specific lien, upon the thing assigned, and upon whatever issues out of it? Manifestly, in equity the mortgagee had the right, by virtue of the stipulations in the mortgage, to sequester the rents, and the only question remaining is as to the manner of enforcing such right. Ordinarily, the method would be by the appointment of a receiver auxiliary to a foreclosure suit. But why should that be held to be the only way? That holding would make it impossible for the mortgagee to avail himself of his right, for the estate having passed into the exclusive jurisdiction of the probate court, no other court could interfere with the probate court's control of the property, and the effect would be to put it in the power of the debtor to defeat, by assignment of his property, the enforcement ⁴¹⁷ of a just and legal lien upon it. That a debtor possesses no such right is elementary.

We think it clear that the right of the mortgagee to proceed against the land for the satisfaction of his mortgage was transferred to the fund arising out of the land, whether from the rents or the sale or both, and the fund being thus in the custody of the court its distribution should be determined on equitable principles. Nor can it make any difference that the fund was acquired through the process of assignment rather than by the appointment and action of a receiver, for, to all intents and purposes obtaining in the present case, there is no essential difference between the two. Each is an arm of the court for the purpose of working out the rights, equitable as well as legal, of the parties. And the mortgagee having the right to resort to the rents as well as to the land itself for the satisfaction of

its debt, a refusal to make such application of the fund would have been a denial of that right. There is no error in this particular: Bausman's Appeal, 90 Pa. St. 178; Wolf's Appeal, 106 Pa. St. 545; First Nat. Bank v. Illinois Steel Co., 72 Ill. App. 640.

2. As to the matter of fines, the claim of the plaintiff in error is that the right to them terminated with the assignment; that the effort now is in effect to collect of the assignee; and that when the company filed its cross-petition, it elected to forfeit the stock for nonpayment and declare the debt due, which action terminated Mrs. Straub's membership in the company, and she was no longer obliged to pay dues, and that obligation having terminated, the obligation to pay fines was at an end.

This proposition also assumes that the mortgagor could relieve herself of the obligations imposed by ⁴¹⁸ her contract by an assignment. It is not tenable. The assignment could have no such consequence. And whatever might have been the effect upon the contract of the commencement by the company of a foreclosure suit, had it resorted to such action, we are of opinion that the filing of its answer and cross-petition did not impair its right to fines, at least to the date of sale, the sale having been ordered prior to the decree finding the amount due the mortgagee. It did not seek the forum, but became a party in invitum, and could not do less than assert its claim when thus brought in. Otherwise its rights would have been lost: See Hagerman v. Ohio etc. Assn., 25 Ohio St. 186.

Judgment affirmed.

Minshall, C. J., and Burket, Davis, and Shauck, JJ., concur.

Williams, J., concurs in the judgment as to rents only.

RENTS.—A MORTGAGE that does not by its terms pledge the rents and profits of the mortgaged premises gives the mortgagee no lien on them. In order to obtain any right thereto before his debt becomes due, he must take a specific pledge thereon as security: Note to Hardin v. Hardin, 27 Am. St. Rep. 793.

CASES
IN THE
SUPREME COURT
OF
UTAH.

STATE v. BATES.

[22 Utah, 65, 61 Pac. 905.]

EVIDENCE—JUDICIAL NOTICE.—A court will take judicial notice of the records and prior proceedings in a case before it.

EVIDENCE—JUDICIAL NOTICE—DECISIONS OF UNITED STATES COURTS.—If a state law as to a certain class of cases has once been held by the United States supreme court to be in contravention of the constitution of the United States, or ex post facto, a state court will, whenever thereafter a case of that class comes before it, take notice of the decision of the national court, and of the question respecting which such decision was made.

JUDGMENTS, VOID—LAW OF CASE.—If a decision by a national court renders absolutely void convictions and judgments in certain cases which have never been appealed from a person released from sentence under such void judgment may be rearrested and prosecuted for the same offense.

JUDGMENTS.—A VOID JUDGMENT IS REALLY NO JUDGMENT, and leaves the parties litigant in the same position they were in before the trial.

JUDGMENTS, VOID—CRIMINAL CASES.—A judgment in a criminal case tried before an unlawful jury and all proceedings therein after entry of plea are wholly void for want of jurisdiction, and may be so treated everywhere and at all times.

JUDGMENTS, VOID — CRIMINAL CASES — JEOPARDY.—If a judgment of conviction is void, the accused has not been put in jeopardy, and upon his discharge under such void judgment he may be rearrested and held for trial under the same indictment.

A. C. Bishop, attorney general, and S. A. King, for the state.

J. W. N. Whitecotton and S. R. Thurman, for the respondent.

⁶⁷ BARTCH, C. J. In this case the defendant was charged, by indictment, with the crime of murder in the second degree. The offense was alleged to have been committed in the county of Tooele, on September 22, 1895, and the indictment was filed on the thirtieth day of the same month, in the district court of the third judicial district of the territory of Utah, which district included that county. On October 1, 1895, the prisoner entered a plea of "not guilty" to the indictment. Thereafter, upon the territory being admitted into the Union as a state, the files and records in the case were transmitted to the clerk of the district court in and for Tooele county. On April 7, 1896, the cause was tried before a jury of eight men, as provided in the constitution and statutes of the state, and convicted, against the objections of the defendant to such a trial. Afterward, upon the defendant being sentenced to the state prison for a period of ten years, the case was appealed to the state supreme court, where the trial by a jury of eight men was held valid and the judgment affirmed. On May 12, 1898, upon habeas corpus proceedings being instituted in the United States district court for the state of Utah, the defendant was released from imprisonment, but was immediately rearrested upon a warrant of arrest issued out of the district court of Tooele county. Then, upon motion of the defendant a change of venue was granted, and the case removed to the district court of Utah county. There, upon motion, in behalf of the prisoner, the cause was dismissed and the bail discharged upon the ground that the court had no jurisdiction of the subject matter or of the person of the defendant, or any authority to try the same. This appeal is from that judgment.

At the outset, counsel for the respondent, insist upon their motion to strike from the transcript an affidavit and ⁶⁸ some other document attached thereto, relating to the proceedings on habeas corpus in the United States district court by which the prisoner was discharged from custody, and claim that they were never settled in a bill of exceptions, and that they have not been certified to this court by the clerk of that court. We do not deem it important to rule upon this motion, because there appears to be nothing in the affidavit and documents referred to, material to this decision, of which we cannot take judicial notice. A court will take notice of the records and prior proceedings in the same case. Likewise, "courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction": 1 Greenleaf on Evidence, secs. 5, 6;

Brown v. Piper, 91 U. S. 37; *State v. Bowen*, 16 Kan. 475; *Dawson v. Dawson*, 29 Mo. App. 521.

So where a state law, as to a certain class of cases, has once been held, by the supreme court of the United States, to be in contravention of the constitution of the United States, or ex post facto, a state court will, whenever thereafter a case of such class comes before it, take notice of the decision of the federal court, which declared such law so ex post facto, and of the question, respecting which the decision was made. This principle was recognized in *State v. Hart*, 19 Utah, 438, 57 Pac. 415, where Mr. Justice Miner, speaking for the court, said: "The cases of *State v. Bates*, 14 Utah, 293, 47 Pac. 78, and *State v. Thompson*, 15 Utah, 488, 50 Pac. 409, practically embraced the same questions involved in this case. In passing upon the latter case the supreme court of the United States, in *Thompson v. Utah*, 170 U. S. 343, 18 Sup. Ct. Rep. 620, held that the provision of article 1, section 10, of the constitution of this state, providing for the trial of criminal cases, not capital, in courts of general jurisdiction, by a jury composed of eight ⁶⁹ persons, instead of twelve, is ex post facto in its application to felonies committed before the territory became a state"; and defendant Morris having committed his offense under the territorial government, we held that, in accordance with that decision, he could be tried in the state court by a jury of twelve men. Hence, following the decision in the Hart case, we may look into that of supreme court of the United States, rendered in the Thompson case, to ascertain to what extent it affects the case at bar.

The main question, therefore, remains to be considered, whether, under the decision of the federal supreme court in the Thompson case, and in view of the previous proceedings and judgment in this case in the state courts, the judgment of dismissal, entered by the lower court herein, was correct.

The appellant contends that the action of the court, in dismissing the case for the want of jurisdiction, was erroneous, and maintains that all the former proceedings, after the entry of the defendant's plea, and the conviction were absolutely void, because the trial was conducted before an unlawful jury; that the judgment resulting therefrom, although affirmed by this court, was likewise null and void; and that no lawful jury having been impaneled and sworn at that trial, the defendant was not in jeopardy. The respondent insists that, as the district court held that it was lawful to try him before a jury of eight men, and having been so tried and convicted, and as the judgment was affirmed by the supreme court and the case never

taken to or the judgment reversed in the supreme court of the United States, he cannot again be tried for the same offense and invokes the doctrine of the law of the case. This position of the respondent, under the facts and circumstances of this case cannot be regarded as ⁷⁰ sound. It is true, the case has been once tried by a jury of eight men, and the state courts held that to be a lawful jury, and the cause was never removed to the federal supreme court, and hence never reversed by it, but the case of *State v. Thompson*, 15 Utah, 488, 50 Pac. 409, which involved the identical question, respecting the validity of the state law providing for eight instead of twelve jurors in the trial of this class of cases, was appealed to the federal supreme court, and that court in that case reversed the state courts, and held the state law *ex post facto* and void, with respect to this class of cases—felonies committed before the territory became a state.

Mr. Justice Harlan, delivering the opinion of the court, in the case said: "In our opinion, the provision in the constitution of Utah providing for the trial in courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons, is *ex post facto* in its application to felonies committed before the territory became a state, because, in respect of such crimes, the constitution of the United States gave the accused, at the time of the commission of his offense, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury."

The effect of that decision was to render absolutely void the conviction had and judgment pronounced, under the state law, in every case of felony, where the offense had been committed before statehood. Therefore, notwithstanding the fact that the case at bar, which is a felony shown to have been committed before the territory became a state, was not in terms reversed by the court of last resort, the effect upon it was just the same as if it had been so reversed. And this is the sense in which that decision was received and treated with respect to this case, ⁷¹ for upon its rendition the respondent was released from imprisonment, and thereafter again arrested under the same indictment and upon the same charge. Under such circumstances the doctrine of the law of the case does not apply. Can he, then, the judgment of the state courts, according to the decision of the supreme court of the United States, being absolutely null and void, be now tried by a lawful jury of twelve men?

A void judgment is really no judgment. It leaves the parties litigant in the same position they were in before the trial. It leaves them in exactly the same position as if no trial had taken place. Such a judgment confers authority upon no one to enforce it.

"A void judgment," says Mr. Black, "is in reality no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid adjudication, nor is it entitled to the respect accorded to one. It can neither affect, impair, nor create rights. As to the person against whom it professes to be rendered, it binds him in no degree whatever, it has no effect as a lien upon his property, it does not raise an estoppel against him. As to the person in whose favor it professes to be, it places him in no better position than he occupied before; it gives him no new right, but an attempt to enforce it will place him in peril. As to third persons, it can neither be a source of title nor an impediment in the way of enforcing their claims. It is not necessary to take any steps to have it reversed, vacated, or set aside. But whenever it is brought up against a party, he may assail its pretensions and show its worthlessness. It is supported by no presumptions, and may be impeached in any action, direct or collateral": Black on Judgments, sec. 170.

In the present case all the proceedings of the trial court, after the defendant had entered his plea, were wholly void,⁷² because the court, in the absence of a lawful jury, had no jurisdiction to try the cause, and, therefore, its sentence and judgment were mere nullities, and the affirmance of the judgment by the supreme court could not make them valid. That judgment, therefore, could be held and treated as a nullity whenever, wherever, and by whomsoever used or relied upon as a valid judgment.

As soon as it was shown that the defendant was tried by a court having no jurisdiction, and that he was denied a right guaranteed him by the federal constitution, the judgment against him was not merely voidable but absolutely void, and he at once became entitled to his discharge, and neither the trial nor the judgment had the effect even of putting the prisoner in jeopardy. As a consequence, upon his release from imprisonment, because of the void judgment, he was again subject to arrest, under the same indictment and upon the same charge, and no plea of once having been put in jeopardy for the same offense can be a bar to a lawful trial, notwithstanding his former conviction stands unreversed. This is so, because the former trial was conducted under a law which

has since been declared, by the court of last resort, to be as to such a case, in contravention of the constitution of the United States, the trial court thus having acted without jurisdiction. Therefore, the respondent may now be tried before a lawful jury.

"If a court has no jurisdiction over the offense, or derives its existence from an unconstitutional statute, or is holding a term not authorized, or is otherwise without authority in the premises, the defendant is not in jeopardy, however far the tribunal proceeds. In most or all of these circumstances, the final judgment is not voidable, as mentioned in a previous section, but void; so that his unreversed conviction is not more a bar to another prosecution ⁷³ than his acquittal": 1 Bishop on Criminal Law, sec. 1028; Black on Judgments, sec. 218; Brown on Jurisdiction, secs. 101, 102; Thompson v. Utah, 170 U. S. 343; State v. Hart, 19 Utah, 438, 57 Pac. 415; In re McClaskey, 2 Okla. 568, 37 Pac. 854; In re Terrill, 52 Kan. 29, 39 Am. St. Rep. 327, 34 Pac. 454; Hill v. People, 16 Mich. 351; State v. Carman, 63 Iowa, 130, 50 Am. Rep. 741, 18 N. W. 691; Hilands v. Commonwealth, 111 Pa. St. 1, 56 Am. Rep. 235, 2 Atl. 70.

We are of the opinion that the court erred in dismissing the case. The judgment is reversed and the cause remanded, with directions to the court below to reinstate the case and proceed in accordance herewith.

Bartch, J., and McCarty, D. J., concur.

JUDICIAL NOTICE MAY BE TAKEN by a court of previous proceedings had in the cause: Hollenbach v. Schnabel, 101 Cal. 312, 40 Am. St. Rep. 57, 35 Pac. 872. But state courts do not take judicial notice of former adjudications in federal courts upon the subject matter in controversy: Kilpatrick v. Kansas City etc. R. R. Co., 38 Neb. 620, 41 Am. St. Rep. 741, 57 N. W. 664.

FORMER JEOPARDY.—One is not put in jeopardy by being prosecuted under void proceedings: Dunn v. State, 2 Ark. 229, 35 Am. Dec. 54. See, too, In re Terrill, 52 Kan. 29, 39 Am. St. Rep. 331, 34 Pac. 457. Legal jeopardy does not result from an arraignment under a void indictment: State v. Ray, Rice, 1, 33 Am. Dec. 90. See, too, Pritchett v. State, 2 Sneed. 280, 62 Am. Dec. 468. A merely defective charge, however, may sustain a former conviction: State v. Bogard, 25 Ind. App. 123, 81 Am. St. Rep. 84, 57 N. E. 722.

KIRKMAN v. BIRD.

[22 Utah, 100, 61 Pac. 338.]

CONSTITUTIONAL LAW—CHANGE OF REMEDY.—The legislature has inherent power to enlarge, limit, alter, or repeal remedial statutes, provided contracts are not directly impaired, and a remedy is left, though less convenient and prompt, than the one so changed or repealed.

CONSTITUTIONAL LAW—CHANGE IN REMEDY.—Any change or limitation of the remedy not materially abridging the right does not impair the obligation of contracts.

CONSTITUTIONAL LAW—EXEMPTION LAWS.—A statute absolutely exempting to married men, or heads of families, their earnings for personal services rendered within the sixty days next preceding the levy of execution, by garnishment or otherwise, is reasonable and directed to the remedy, and not to the right, and does not impair the obligation of contracts entered into prior to its passage.

Krebs & Hoppaugh, for the appellant.

Bennett, Harkness, Howat, Sutherland & Van Cott, for the respondent.

108 BASKIN, J. There is no controversy in regard to the facts in this case which are as follows:

That on the 13th of May, 1896, the defendant was indebted to the plaintiff for goods and merchandise previously sold by the latter to the defendant; that on that ¹⁰⁹ day the plaintiff recovered on said indebtedness a judgment for two hundred and eighty-five dollars and forty-seven cents, and costs amounting to eleven dollars and twenty-five cents; that on the 12th of December, 1899, an execution was issued on said judgment, and the Rio Grande Western Railway Company was garnisheed; that said company, on the 28th of December, 1899, answered "that it was indebted to the defendant in the sum of seventy-seven dollars and fifty cents for services rendered from November 1 to December 12, 1899, inclusive, which was subject to the claim of plaintiff; that the same was exempt from execution; that the defendant was before and at the date of said garnishment, and had ever since been a married man with a wife and child dependent upon him for support, and that he and his wife and child were before and at the date of said garnishment, and ever since have been, residents of Salt Lake City, Utah."

The respondent, William Bird, Jr., also filed an answer alleging the same facts set up by said company.

A. L. Hoppaugh, one of the attorneys for the plaintiff, made and filed an affidavit admitting the facts alleged in the foregoing answers, except the conclusion that said earnings were exempt from execution, and stating that at the time said goods and merchandise were sold and said judgment rendered, the said Bird had no property except his monthly earnings for personal services, and that one-half of said earnings, at the last-named dates were, and ever since have been, subject to the execution of said judgment. It is also admitted that defendant has no property upon which execution can be levied, or out of which said judgment can be satisfied, if all of the earnings of said defendant are exempt from execution.

The respondents claim exemption under an act of the legislature, approved March 9, 1899 (Laws 1899, p. 99, sec. 7), ¹¹⁰ which exempts from execution "the earnings of the judgment debtor for personal services rendered within sixty days next preceding the levy of the execution, by garnishment or otherwise, if the judgment debtor be a married man, or with a family dependent upon him for support."

The court below held that said earnings, under said provision, were exempt and rendered judgment accordingly.

The appellant contends that the legislature did not intend that said provision should have any retroactive effect, and that the judgment in this case, giving it such effect, is in violation of section 10, article 1 of the constitution of the United States, and impairs the obligation of the implied contract between the parties which arose, upon sale of the said goods and merchandise, previous to the passage of said act.

At the date of the implied contract and the rendition of said judgment, under the attachment law then in force, garnishment of one-half only of the defendant's earnings for his personal services, rendered within sixty days preceding service on the garnishee, was permissible: 2 Comp. Laws 1888, p. 307, subd. 7; Laws 1896, p. 214, sec. 7.

Section 7 of the act of 1899 did not abolish the remedy by garnishment, but simply amended the former act, so as to exclude the whole of such earnings for services rendered during such period from the operation of that process, when the judgment debtor is a married man or has a family dependent upon him for support. So that the alleged injury complained of in this case is said limitation of the remedy by garnishment. Therefore, the only question presented is whether this limitation impairs the obligation of the contract. The remedy by garnishment

is ¹¹¹ purely statutory, and not a common-law right: 9 Am. & Eng. Ency. of Law, 809; Drake on Attachments, sec. 451a.

In the case of *Sturges v. Crowningshield*, 4 Wheat. 200, Chief Justice Marshall said: "Without impairing the obligation of the contract the remedy may certainly be modified as the wisdom of the nation shall direct." In that case, it was held that the remedy of imprisonment (which existed at common law) might be abolished without impairing the obligation of the contract.

In the case of *Bronson v. Kinzie*, 1 How. 315, Chief Justice Taney, in the opinion said: "Undoubtedly, a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may, if it thinks proper, direct that the necessary implements of agriculture or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not by every sovereignty, according to its own views of policy and humanity. It must reside in every state to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community. And although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the constitution."

¹¹² In the case of *Edwards v. Kearzey*, 96 U. S. 607, the court sums up its conclusions in this language: "The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution, and is, therefore, void."

Justice Clifford, in a concurring opinion in the foregoing case on pages 608, 609, said: "Beyond all doubt, a state legislature may regulate all such proceedings in its courts at pleasure, subject only to the condition that the new regulation shall not in any material respect impair the just rights of any party to a pre-

existing contract. Authorities to that effect are numerous and decisive, and it is equally clear that a state legislature may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or certain articles of universal necessity in household furniture, shall, like wearing apparel, not be liable to attachment and execution for simple contract debts. Regulations of the description mentioned have always been considered in every civilized community as properly belonging to the remedy to be exercised or not by every sovereignty, according to its own views of policy and humanity."

And Justice Hunt, in a concurring opinion in the same case, page 610, said: "I think that the law was correctly announced by Mr. Chief Justice Taney in *Bronson v. Kinzie*, 1 How. 311, when he said: A state 'may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of a mechanic, or articles of necessity in household furniture, shall like wearing apparel, be not liable to execution on judgments.'"

In the case of *Tennessee v. Sneed*, 96 U. S. 74, Justice 113 Hunt, in delivering the opinion of the court, said: "On the general subjects and for numerous illustrations reference is made to the following cases: *Bronson v. Kinzie*, 1 How. 311 (before quoted from) and *Von Hoffman v. Quincey*, 4 Wall. 553. In the latter case it was stated that the right to imprison for debt is not a part of the contract. It is regarded as penal, rather than remedial. The states may abolish it whenever they think proper. They may also exempt from sale, under execution, the necessary implements of agriculture, the tools of a mechanic, and articles of necessity in household furniture. It is said: 'Regulations of this description have always been considered in every civilized community as properly belonging to the remedy, to be exercised by every sovereignty according to its views of policy and humanity.'

"It is competent for the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances": See, also, *Penman's case*, 103 U. S. 714; *McGaghey v. Virginia*, 135 U. S. 662, 10 Sup. Ct. Rep. 972; *Perego v. Dodge*, 163 U. S. 160, 16 Sup. Ct. Rep. 971; *Cooley's Constitutional Limitations*, 346 et seq.; *Sutherland on Statutory Construction*, 477, 483. In *Sutherland on Stat-*

utory Construction, section 482, it is stated: "No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights. . . . A remedy may be provided for existing rights, and new remedies added to or substituted for those which exist. Every case must, to considerable extent, depend upon its own circumstances. ¹¹⁴ General words in remedial statutes may be applied to past transactions and pending cases, according to all indications of legislative intent, and this may be greatly influenced by considerations of convenience, reasonableness, and justice."

Judge Cooley, in his work on Constitutional Limitations, page 346, says: "Such being the obligation of a contract, it is obvious that the rights of the parties in respect to it are liable to be affected in many ways by changes in the laws, which it could not have been the intention of the constitutional provision to preclude. There are a few laws which concern the general policy of a state, or the government of its citizens, in their intercourse with each other or with strangers, which may not in some way or other affect the contracts which they have entered into or may thereafter form."

Creditors as well as debtors are presumed to know that the legislature has an inherent power to enlarge, limit, alter, or repeal remedial statutes, provided that contracts are not directly impaired, and a remedy be left, though less convenient and less prompt and speedy, than the one so changed or repealed. Also, to enact such laws as "according to its own views of policy and humanity, it may deem necessary to protect the citizens of the state from unjust, merciless, and oppressive litigation and other evils detrimental to the common weal; and protect them in those pursuits of industry, and secure to them those privileges and rights which experience has already shown or in the future may be shown to be necessary to the prosperity and strength of the state, although such necessary laws may in some way or other affect contracts previously entered into." Among such necessary laws are police regulations, exemptions from forced sales on execution of necessary implements of agriculture, the tools of ¹¹⁵ mechanics, necessary household furniture for the use of the family, and their wearing apparel; exemption of a portion of the wages of laborers, etc.

Parties making contracts, I think, should be charged with notice that the legislature has a right to make such necessary changes in the laws, and that it should be presumed that they intended their contracts to be subject to such reasonable and necessary changes.

Judge Cooley, in his work on Constitutional Limitations, 707, 708, states the proposition thus: "The occasions to consider this subject in its bearings upon the clause of the constitution of the United States which forbids the states passing any laws impairing the obligation of contracts have been frequent and varied; and it has been held without dissent that this clause does not so far remove from state control the rights and properties which depend for their existence or enforcement upon contracts, as to relieve them from the operation of such general regulations for the good government of the state and the protection of the rights of individuals as may be deemed important. All contracts and all rights, it is declared, are subject to this power; and not only may regulations which affect them be established by the state, but all such regulations must be subject to change from time to time, as the general well-being of the community may require, or as the circumstances may change, or as experience may demonstrate the necessity."

In the Dartmouth College Case, 4 Wheat. 429, Chief Justice Marshall uses this language: "The framers of the constitution did not intend to restrain the states in the regulation of their civil institutions adopted for internal government, and that instrument they have given us is not to be so construed."

Certainly, any change or limitation of the remedy which does not materially abridge the right does not impair the ¹¹⁶ obligation of the contract. As stated in Van Hoffman v. Quincy, 4 Wall. 554, "every case must be determined upon its own circumstances."

In the case at bar it is conceded that the defendant has a family dependent upon him for support, and that his only means of doing so is his wages. It is a matter of common knowledge that at the time and previous to the passage of the act, limiting the remedy by garnishment, many other citizens of the state were in the same situation as the defendant, and that, owing to the financial crisis which prevailed, it was a difficult task for the laborer to earn sufficient to properly support his family. In view of these facts the limitation of the remedy of garnishment was reasonable and necessary, and is not such a change as impairs the obligation of the contract.

It is ordered that the judgment of the court below be affirmed, and that the appellant pay the costs.

Bartch, C. J., and Miner, J., concur.

CONSTITUTIONAL LAW.—THE LEGISLATURE MAY CHANGE the form of remedies, provided no substantial right se-

cured by contract is thereby impaired: *Merchants' Bank v. Ballou*, 98 Va. 112, 81 Am. St. Rep. 715, 32 S. E. 481.

EXEMPTIONS.—THE LEGISLATURE CANNOT INCREASE the exemption from execution, as to existing debts: *Johnson v. Fletcher*, 54 Miss. 628, 28 Am. Rep. 388; *Wilson v. Brown*, 58 Ala. 62, 29 Am. Rep. 727. See, further, the note to *Goshen v. Stonington*, 10 Am. Dec. 138; 2 *Freeman on Executions*, sec. 219.

STATE v. WILLIAMSON.

[22 Utah, 248, 62 Pac. 1022.]

RAPE.—AN INDICTMENT for rape need not specify the sex of the defendant, nor that the person ravished was not his wife.

CRIMINAL LAW.—AN INDICTMENT must in all cases employ so many of the substantial words of the statute as will enable the court to see on what statute it is founded, and all other words which are essential to a complete description of the offense, or such words as are equivalent, or more than equivalent, to those used in the statute, provided they include the full signification of the statutory words, but not otherwise.

CRIMINAL LAW.—INDICTMENTS FOR PURELY STATUTORY OFFENSES need only charge the defendant with all the acts within the statutory definition, substantially in the words of the statute, without further expansion.

CRIMINAL LAW — INDICTMENTS — EXCEPTIONS, WHETHER MUST BE NEGATIVED.—If a statute defining an offense contains an exception in its enacting clause which is so incorporated with the language defining the offense that the ingredients thereof cannot be accurately and clearly described if the exception is omitted, an indictment founded upon the statute must allege enough to show that the accused is not within the exception. If the language clearly defining the offense is entirely separable from the exception, the indictment may omit any reference to the exception.

CRIMINAL LAW—INDICTMENTS—STATUTORY CRIMES. If a statute prohibits the doing of a particular act without the authority of one or two things, the indictment must negative the existence of both.

CRIMINAL LAW.—REASONABLE DOUBT is not a mere imaginary, captious, or possible doubt, but a fair doubt, based upon reason and common sense, growing out of the evidence in the case. It is such a doubt as will leave a juror's mind, after a careful examination of all of the evidence, in such a condition that he cannot say that he has an abiding conviction, to a moral certainty, of the defendant's guilt.

RAPE—EVIDENCE OF CHASTITY OF PROSECUTRIX. In a prosecution for rape, evidence of want of chastity in the prosecutrix is not admissible.

W. F. Knox, for the appellant.

A. C. Bishop, attorney general, for the state.

250 MINER, J. The defendant was charged by information with the crime defined by section 4221 of the Revised Statutes of 1898, which is as follows: "Any person who shall carnally and unlawfully know any female over the age of thirteen years and under the age of eighteen years, shall be guilty of a felony."

The terms in which the crime is alleged in the information are as follows: "That John H. Williamson, in and upon one Belle Anderson, a female under the age of eighteen years, and over the age of thirteen years, to wit, the age of fifteen years, feloniously did make an assault, and her, the said Belle Anderson, then and there did carnally and unlawfully know, contrary to the form of **251** the statute in such case made and provided, and against the peace and dignity of the state of Utah." A demurrer was filed to the information, and one of the grounds stated is that the information "does not state facts sufficient to constitute a crime." The demurrer was overruled by the trial court, and this is assigned as error.

One of the reasons urged by counsel for the defendant why the information fails to charge a crime against the defendant is that it fails to state that the said Belle Anderson was not at the time of the alleged intercourse the wife of the defendant.

Section 4221 makes it a felony for any person to carnally and unlawfully know any female over the age of thirteen years and under the age of eighteen years.

Section 4730 provides that the information shall contain a statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended.

Section 4732 requires the information to be direct and certain as regards the party charged, the offense charged, and the particular circumstances of the offense when they are necessary to constitute a complete offense.

The word "male" does not appear in the statute, yet it is well known that no one but a male person could be indicted for the specific offense of rape, and the court would construe the statute to mean that a male person only could consummate the offense named therein. The information in such a case need not specify the sex of the defendant: *United States v. Cannon*, 4 Utah, 122, 7 Pac. 369.

In a prosecution for rape it is not necessary, under our statute, to show in the information that the person ravished was not the

wife of the defendant. The statute contains no provision or exception requiring it: Commonwealth ²⁵² v. Fogerty, 8 Gray, 489, 69 Am. Dec. 264; State v. White, 44 Kan. 514, 25 Pac. 33; State v. Halbert, 14 Wash. 306, 44 Pac. 538; State v. Williams, 9 Mont. 179, 23 Pac. 335.

In the former case it was held that in a case of rape it was not necessary to allege in the information that the prosecutrix was not the wife of the defendant. Such an averment has never been required to be inserted in an indictment for rape, either in this country or in England. The party indicted, however, may show in his defense that the alleged act was committed with his wife.

It will be seen that our statute, with reference to this offense, contains no exception in the enacting clause. In such cases says Bishop: "Where a statute defines the offense which it creates, it is ordinarily adequate, while nothing less will in any instance suffice, to charge the defendant with all the acts within the statutory definition, substantially in the words of the statute, without further expansion": 1 Bishop's Criminal Procedure, sec. 611.

The indictment should, in all cases, employ so many of the substantial words of the statute as will enable the court to see on what statute it is founded, and all other words which are essential to a complete description of the offense, or such words which are equivalent, or more than equivalent to those used in the statute, provided they include the full signification of the statutory words, but not otherwise.

In *United States v. Cook*, 17 Wall. 168, it is said: "Where a statute defining an offense contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, an indictment founded upon the statute must allege enough to show that the ²⁵³ accused is not within the exception. But if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the indictment may omit any such reference. The matter contained in the exception is matter of defense, and to be shown by the accused."

It is also held that no allegation of unlawfulness, nor being against the statute, nor in collusion, will make good the indictment, if it does not bring the acts prohibited or commanded,

in the doing or not doing of which the offense consists, within the material words of the statute.

So if the statute prohibits the doing of a particular act without the authority of either one or two things, the indictment should negative the existence of both those before it can be sufficient. If the exception is stated in the enacting clause of the statute, it is ordinarily necessary to negative it in order that the description of the crime may correspond with the statute, as, if a statute imposes a penalty for the sale of spirituous liquors without a license, the indictment should aver the want of a license: Archibald on Criminal Law, sec. 379; State v. McDonald, 14 Utah, 173, 46 Pac. 872.

In the case of *People v. Fairbanks*, 7 Utah, 3, 24 Pac. 538, the territorial court held, that under section 4488 of the Compiled Laws of Utah of 1888, providing that every person who with intent to do bodily harm, and without just cause or excuse, etc., commits an assault, etc., the indictment must negative the clause "just cause or excuse." In the syllabi, and at the foot of the opinion in the case of *State v. McDonald*, 14 Utah, 173, 46 Pac. 872, the reporter erroneously states that the former case was overruled. This is incorrect. The case was not overruled by the latter decision. The statutes under which each of these two cases were brought were not at all identical. ²⁵⁴ The case of *State v. McDonald*, 14 Utah, 173, 46 Pac. 872, was brought under section 4471 of the Compiled Laws of Utah of 1888, providing "that every person who assaults another with intent to murder is punishable," etc. The indictment charged the defendant with the crime of assault with intent to commit murder, describing the offense, without alleging that the assault was committed without "just cause or excuse," or that it was committed with malice aforethought, and the court held the information good. The charge was in the substantial language of the statute creating the offense. The court held that "murder means the killing with malice aforethought," and that killing "with malice aforethought means murder; that the definition of murder excludes the idea of any just cause or excuse for the killing, or any provocation, however great, to justify it."

In the case of *People v. Colton*, 2 Utah, 459, the statute provided that any man and woman, not being married to each other, carnally and lasciviously associate and cohabit together shall be punished, etc. It was there held that the negative averment should be in the indictment averring that the parties were not married, as it constituted a part of the description of the offense required by the statute.

In California it is held that where a statute introduces a new offense, without referring to anything else, it will be sufficient to describe the offense in the information in the language of the statute: *People v. Saviers*, 14 Cal. 29; *People v. Murray*, 67 Cal. 103, 7 Pac. 178.

We are of the opinion that where the offense charged is purely statutory, as in this case, having no relation to the common law, it is, as a general rule, sufficient in the indictment to charge the defendant with the acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion ²⁵⁵ of the matter, and that it was unnecessary for the prosecution in this case to charge in the information that the woman with whom the offense was committed was not the wife of the defendant: *State v. McDonald*, 14 Utah, 173, 46 Pac. 872; *Commonwealth v. Fogerty*, 8 Gray, 489, 69 Am. Dec. 264; *United States v. Simonds*, 96 U. S. 360; *United States v. Cook*, 17 Wall. 168; *State v. Fairbanks*, 7 Utah, 3, 24 Pac. 538; *People v. Colton*, 2 Utah, 457; *State v. Williams*, 9 Mont. 479, 23 Pac. 335; *State v. Halbert*, 14 Wash. 306, 44 Pac. 538; *State v. White*, 44 Kan. 514, 25 Pac. 33; *People v. Murray*, 67 Cal. 103, 7 Pac. 178; *People v. White*, 34 Cal. 183; 1 Bishop on Criminal Procedure, secs. 611, 612; Wharton's American Criminal Law, sec. 379.

Counsel for the appellant challenge the instructions of the court on the subject of reasonable doubt. Upon examination we find that the charge given, as a whole, was correct, although the following part thereof, taken by itself, has been criticised: "It means such a doubt as would cause a prudent man to pause and hesitate before accepting as true and acting upon any matter alleged and charged in the graver and important affairs of life": *Hampton v. People*, 29 Mich. 195; *People v. Stubenvoll*, 62 Mich. 329, 28 N. W. 883; *People v. Marble*, 38 Mich. 125.

It is not advisable to enlarge upon or enter into details in giving the definition of a reasonable doubt. A doubt is a fluctuation or uncertainty of the mind arising from defect of knowledge or of evidence, and a doubt of the guilt of the accused party honestly entertained from the evidence is a reasonable doubt.

A very satisfactory and comprehensive definition of a reasonable doubt was given in the case of *State v. McCune*, 16 Utah, 170, 51 Pac. 818. As given the instruction reads as follows: "A reasonable doubt is not a mere imaginary, captious, or possible doubt, but a fair doubt, based upon reason and ²⁵⁶ common sense, and growing out of the testimony in the case. It is such a doubt as will leave the juror's mind, after a care-

ful examination of all the evidence, in such a condition that he cannot say that he has an abiding conviction, to a moral certainty, of the defendant's guilt."

Counsel for the appellant also raises a question as to the sustaining of the objection to the testimony offered as to the want of chastity and bad character of the young woman with whom the offense was committed.

An examination of the case of *State v. Hilberg*, 22 Utah, 27, 61 Pac. 215, decided at the February term of this court, will show that there is no legal merit in this contention.

Upon a further examination of the law presented by the able counsel for the respective parties, we have concluded on rehearing to change our former ruling, and now hold that we find no reversible error in the record.

The judgment of the district court is affirmed.

Bartch, C. J., concurs.

Baskin, J., dissents.

AN INDICTMENT FOR RAPE need not allege the sex of the woman ravished, or that she is not the wife of the defendant: See the monographic note to *Smith v. State*, 80 Am. Dec. 374. As to whether it is necessary to allege the sex of the defendant, see *State v. Williams*, 32 La. Ann. 335, 36 Am. Rep. 272.

AN INDICTMENT FOR A STATUTORY OFFENSE is generally sufficient, if it describes the offense in the words of the statute: *Dickhaut v. State*, 85 Md. 451, 60 Am. St. Rep. 332, 37 Atl. 21. And only such exceptions and provisos need be negatived as are descriptive of the offense: *State v. Bouknight*, 55 S. C. 353, 74 Am. St. Rep. 751, 33 S. E. 451.

CRIMINAL LAW.—A REASONABLE DOUBT is properly defined as an actual, substantial doubt of guilt, arising from the evidence or want of evidence in the case: *Ferguson v. State*, 52 Neb. 432, 66 Am. St. Rep. 512, 72 N. W. 590. See, further, the monographic note to *Burt v. State*, 48 Am. St. Rep. 566-579, on reasonable doubt.

RAPE—EVIDENCE OF CHASTITY.—In prosecutions for rape, evidence that the reputation of the prosecutrix for chastity is bad is admissible: Note to *Smith v. State*, 80 Am. Dec. 368; *State v. Taylor*, 57 S. C. 483, 76 Am. St. Rep. 575.

STRICKLEY v. HILL.

[22 Utah, 257, 62 Pac. 893.]

MINES AND MINING—LOCATORS—CITIZENSHIP.—If it appears that a mine locator, although of foreign birth, had resided within the United States for many years, had served as a soldier in the Civil War of 1863, had been honorably discharged from the army, had exercised the right of the franchise at several elections, had taken an oath that he was over twenty-one years of age, and a naturalized citizen of the United States, and that he would support the constitution thereof, and that he had drawn a pension as a disabled soldier, a finding that he is a naturalized citizen will not be disturbed.

MINES AND MINING—LOCATORS—CITIZENSHIP.—The rights of a citizen mine locator and of his grantees is not affected by the fact that his colocator is an alien.

MINES AND MINING—LOCATORS—CITIZENSHIP.—If a citizen and an alien locate a mining claim, not exceeding the amount of ground allowed to one locator, such location is valid as to the citizen, or to one who has declared his intention to become such, and a conveyance by him through an alien to another citizen conveys a complete title to the claim located, provided all other provisions of the law were complied with, and there are no intervening rights.

MINES AND MINING—LOCATION BY ALIEN.—An alien who has declared his intention to become a citizen by enlistment in the United States army may locate a mining claim upon unoccupied public domain.

NATURALIZATION—RECORDS OF—PROOF, WHEN LOST. The general rules that when a record has been lost or destroyed, or by lapse of time, or by the death of a person naturalized, and the record cannot be produced, secondary evidence is admissible to prove the naturalization, and proof that a person served in the United States army and was honorably discharged therefrom has a strong tendency to show a declaration of intention to become a citizen, as well as being a strong circumstance tending to show naturalization.

CITIZENSHIP—WHEN MUST BE SHOWN.—Citizenship, or a declaration of intention to become a citizen, must be proved in a suit in aid of a patent protest and adverse claim under section 2326 of the Revised Statutes of the United States.

APPELLATE PRACTICE—EVIDENCE TO SUPPORT FINDINGS.—If there is evidence to support findings, its weight is within the province of the trial court, and its determination cannot be disturbed on appeal.

MINES AND MINING—BOUNDARIES—ESTABLISHMENT BY CONSENT.—The consent of an owner of an undivided interest in a mining claim to the establishment of a certain line as a boundary cannot bind his nonconsenting co-owner.

MINES AND MINING—BOUNDARIES—ESTABLISHMENT BY PAROL CONSENT.—If adjoining owners and their predecessors in interest occupy land to a given line, treating that as the

boundary between their respective lots for twenty years, neither can thereafter claim beyond such line.

BOUNDARIES.—A PAROL AGREEMENT long acquiesced in to settle a boundary between adjoining owners, being the result of an honest attempt to fix the true boundary according to which the parties and their predecessors have actually occupied and made improvements with reference thereto, although the time has not been sufficient to establish a bar under the statute of limitations, works an estoppel, but a recent parol agreement between persons fixing the boundaries between unpatented mining claims is void under the statute of frauds, and does not bind the government.

C. F. and T. F. C. Loofborrow, for the appellant.

Booth, Lee & Ritchie, for the respondents.

264 MINER, J. The appellant contends: 1. That the location of the Amazon No. 2 was void because made by aliens; that under section 2319 of the Revised Statutes of the United States, a location could only be made by a citizen of the United States, or those who had declared their intention to become such; 2. That the Amazon No. 2 was not originally located upon unoccupied mineral lands of the United States as now claimed; 3. That the lines between these properties were fixed by agreement of the parties in accordance with the new survey as now claimed, and should not be disturbed.

1. As to the first contention of the appellant it appears that Tiernan, one of the locators of the Amazon No. 2, was a native-born citizen of the United States and qualified to make the location; that he and Jackson located the Amazon No. 2 on February 17, 1882. Jackson, the other locator, was reported to have been born in Scotland, but had lived in the United States for many years in the states of California, Montana, and Utah. He was about sixty-three years old at the time of the location, and was about seventy-five years old when he died in 1897. Prior to 1886 he had exercised the right of franchise, and voted at the territorial elections five or six different times. After his death his naturalization papers were not found among his effects. **265** He had resided near the claim in question at Bingham for several years and worked the claim.

The registrar of election testified that Jackson subscribed and swore to a registration oath then required to be taken by each elector before voting; that such affidavit was taken before him at Bingham on June 4, 1887. That oath was produced from the office of the county clerk, where it was on file, and it was found to have been filed August 3, 1887, and was introduced in evidence. It appears from the oath that Jackson testified that he was over twenty-one years old, a resident of the territory of

Utah for more than six months; that he was a naturalized citizen of the United States, sixty-three years of age, and that he would support the constitution of the United States, etc. It also appears from the testimony and from his discharge papers in evidence that he was a soldier in the war of the Rebellion, and was enrolled in Company "B," First Batallion, Nevada Cavalry, August 5, 1863, for three years, or during the war, and was honorably discharged from the service of the United States on the twenty-first day of July, 1866. Thereafter he was awarded and drew a pension from the United States government on account of disability and injuries received, his feet having been frozen, and three toes having been amputated. The trial court found that Tiernan was a citizen; that Jackson became, by due process of naturalization according to law at some time prior to June 4, 1887, a citizen of the United States, and continued a citizen until his death in March, 1897.

We are of the opinion that there was evidence to sustain the findings. Tiernan was unquestionably a citizen at the time of the location. His rights, nor those of his grantees, would not be affected by the fact that his colocator was not a citizen. If a citizen and an alien jointly locate a claim, not exceeding the amount of ground ²⁶⁶ allowed to one locator, such location is valid as to the citizen, or to one who has declared his intention to become such, and a conveyance by him through an alien to another citizen conveys a complete title to the claim located, provided all other provisions of the law were complied with and there be no intervening rights: *North Noonday Min. Co. v. Orient Min. Co.*, 6 Saw. 300, 1 Fed. 522; 1 *Lindley on Mines*, sec. 234; *Manuel v. Wulff*, 152 U. S. 505, 14 Sup. Ct. Rep. 651; *Wilson v. Triumph Min. Co.*, 19 Utah, 66, 75 Am. St. Rep. 718, 56 Pac. 300.

So the fact that the Amazon No. 2 was located by Tiernan, a citizen, and by Jackson in 1886, before any other location was made, and the claim contained no more than one citizen was authorized to locate, the location of the claim as to Tiernan is good even though Jackson was an alien and not entitled to locate it: *North Noonday Min. Co. v. Orient Min. Co.*, 6 Saw. 300, 1 Fed. 522; *Wilson v. Triumph Min. Co.*, 19 Utah, 66, 75 Am. St. Rep. 718, 56 Pac. 300.

Selby, though an alien, and not having declared his intention to become a citizen of the United States, having received conveyance of an unpatented mining claim from a citizen who located it, could acquire by deed and hold the title the locators of such claim acquired under section 2319, and convey the same

before office found, which would not occur until on or after the proceedings were commenced to obtain a patent to conflicting lands claimed by the Navajo, June 9, 1897, and protest proceedings were filed, and title to the Navajo asserted.

In *Phillips v. Moore*, 100 U. S. 212, it is said: "By the common law an alien cannot acquire real property by operation of law, but may take it by act of the grantor, and hold it until office found; that is, until the fact of alienation is authoritatively established by a public officer, upon an inquest held at the instance of the government. The proceeding which contains the finding of the fact ²⁶⁷ upon the inquest of the officer is technically designated in the books of law as 'office found.' It removes the fact, upon the existence of which the law divests the estate and transfers it to the government, from the region of uncertainty, and makes it a matter of record. It was devised, according to the old law-writers, as an authentic means to give the king his right by solemn matter of record, without which he in general could neither take nor part with anything; for it was deemed 'a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon or seize any man's possessions upon bare surmises, without the intervention of a jury': *Ferguson v. Neville*, 61 Cal. 258; 1 *Lindley on Mines*, sec. 233; *Manuel v. Wulff*, 152 U. S. 505, 511, 14 Sup. Ct. Rep. 651; *North Noonday Min. Co. v. Orient Min. Co.*, 6 Saw. 300, 1 Fed. 522. But the respondents claim that because Jackson was an honorably discharged soldier of the United States no proof of declaration of intention was necessary.

By section 2319 of the Revised Statutes of the United States mineral lands of the United States are subject to location by citizens thereof, or those who have declared their intention to become such.

Section 2166 of the Revised Statutes of the United States provides that "any alien, of the age of twenty-one years and upward, who has enlisted, or may enlist, in the armies of the United States, either the regular or volunteer forces, and has been, or may be hereafter, honorably discharged, shall be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become such."

Both Jackson and Selby were shown to have been soldiers and honorably discharged from the army of the United States.

In *Smith v. United States*, 16 U. S. Land Dec. Dep. Int. ²⁶⁸ 352, it was held by the general land office at Washington, and

such rule has been followed in that department, that an alien twenty-one years of age, who is honorably discharged after serving an enlistment in the United States army occupies the status of one who has declared his intention to become a citizen under section 2166 of the Revised Statutes under the homestead law.

In 2 Land Dec. Dep. Int., page 195, the same rule is laid down, and it is held that service in the United States army, as required by the statute, is equivalent to a declaration of intention to become a citizen, and this rule was approved by the secretary of the interior.

These decisions had reference to homestead entries, but the statutory requirements as to citizenship are the same under section 2289 applying to homesteads as is section 2319 as to mineral land. This rule has never been questioned in the department, and has not been overthrown so far as we are able to discover.

In *Manuel v. Wulff*, 152 U. S. 511, 14 Sup. Ct. Rep. 651, and in *Iron etc. Min. Co. v. Elgin Min. etc. Co.*, 118 U. S. 207, 6 Sup. Ct. Rep. 1177, the supreme court refer to certain rulings of the department approvingly, and say that to overturn them would seriously affect titles. While we cannot give the weight to these decisions of the department that the respondents claim for them, yet the fact that Jackson served in the army of his country and was honorably discharged therefrom has a strong bearing tending to show a declaration of intention to become a citizen, as well as a strong circumstance tending to show naturalization, and in connection with other facts and circumstances may be sufficient to establish the fact itself.

The general rule is that where a record has been lost or destroyed, or by lapse of time, or by death of the person naturalized, and the record cannot be produced, secondary ²⁶⁹ evidence is admissible to prove naturalization: 6 Am. & Eng. Ency. of Law, 26. Citizenship may be proved like any other fact, and is a question for the court and jury to pass upon.

Section 2321 of the Revised Statutes of the United States provides that proof of citizenship may consist, in the case of an individual locator, of his own affidavit, but in contests like this, where the case is brought under section 2326 of the Revised Statutes, in a contest for a patent, proof of citizenship or the declaration to become such is required: 1 Lindley on Mines, 226; *North Noonday Min. Co. v. Orient Min. Co.*, 6 Saw. 300, 1 Fed. 522.

The evidence tends to show that Jackson had a long residence in the United States, and spent many years near the mine in

question. His death increased the difficulties of securing proof of his naturalization, even if it was obtained. He had exercised the right of citizenship and voted at many elections prior to the entry of the claim in 1886, and had previously resided in California and Montana.

Among the records of the county clerk required by law to be kept was his affidavit made and regularly filed in 1887, wherein he testified that he was a naturalized citizen of proper age. The handwriting to the affidavit is shown to be Jackson's writing, and he is shown to be the same man who located the claim. He died in 1897, ten years after the affidavit was made and filed and became a record in the clerk's office. He assumed to be the owner of the mine, and was dealt with as such owner, and the defendant recognized him as part owner of the Amazon No. 2 when the survey was made in 1896. He had previously, in 1863, enlisted as a soldier in the defense of his country, was honorably discharged after two years' service, and drew a pension on account of disability and injuries contracted in the United States service. Having resided in ²⁷⁰ three different states where his naturalization papers could have been obtained, and the time when obtained, if at all, being very remote, the difficulties in the way of obtaining primary evidence was increased.

The trial court heard all the testimony and saw the witnesses and found, as it had a right to find, that Jackson was a citizen of the United States because of his naturalization according to law at some time prior to June 4, 1887, and continued such until his death in 1897.

There was evidence before the court to support the findings. The question of its weight was within the province of the trial court to determine, and we are not satisfied that its determination is not correct: *Boyd v. Nebraska*, 143 U. S. 135, 12 Sup. Ct. Rep. 375; *Hogan v. Kurtz*, 94 U. S. 773; *Blight v. Rochester*, 7 Wheat. 535; *People v. McNally*, 59 How. Pr. 500; *North Noonday Min. Co. v. Orient Min. Co.*, 6 Saw. 503, 11 Fed. 126; *Manuel v. Wulff*, 152 U. S. 505, 14 Sup. Ct. Rep. 651; 1 *Lindley on Mines*, sec. 227; *North Noonday Min. Co. v. Orient Min. Co.*, 6 Saw. 300, 1 Fed. 522.

2. The appellant also contends that the Amazon No. 2 was not originally located upon all the ground now claimed by the plaintiffs. Each of the parties claims that the other has shifted its boundaries. A large amount of testimony was introduced to sustain these contentions on the part of the appellant, while the respondents also introduced much testimony to show that

the ground was the same as first located, and that the Amazon No. 1 had been abandoned by Jackson, the locator, prior to the location of the Amazon No. 2 over substantially the same ground.

The testimony was extremely contradictory and conflicting, and the court found the issues in favor of the respondents. We do not deem it necessary to review in detail all the mass of contradictory testimony taken upon ²⁷¹ that subject. From a careful review of it we are satisfied that the court gave proper weight to it, and we do not feel called upon to disturb its decision in this respect: *Larson v. Onesite*, 21 Utah, 38, 59 Pac. 234.

3. Appellant also contends that the line between the Amazon No. 2 and the Navajo mine was fixed by agreement of the parties in accordance with the Navajo survey, and that such line so fixed should not be disturbed.

The testimony tends to show that William J. Strickley, son of John Strickley, and Jackson were, by request, present a part of the time when a survey was being made of the Navajo for a patent. William J. Strickley states that he did not appear by request or authority of his father, the plaintiff, but that he was looking after the land and his father's interest, and made no objection to placing the posts and stakes on the northeast and southeast corners of the claim as they were set by the surveyor; but he also testifies, and it appears from other testimony, that Jackson did object to the line as was then attempted to be fixed by appellant's surveyor, and objected to the placing of the corner posts and stakes as they were placed between the claims, and was never satisfied with the line.

The testimony concerning the agreed boundary was objected to as being within the statute of frauds, and because parties cannot establish a corner as against the government by consent of the locators. The objection was sustained, but the testimony admitted for the purpose of showing that if respondents made statements in derogation of the location they now claim it was admissible, but that the location would control notwithstanding their statements.

While the testimony is conflicting and contradictory, we are not satisfied that any agreement was made concerning the line. The testimony does not show that Jackson ever ²⁷² consented to fixing the line or in placing the posts and stakes where the surveyor for the appellant placed them. Whether John Strickley so consented is not important. Jackson and Strickley each owned an undivided interest in the claim. Therefore, Strickley's

consent to the boundary line would not bind Jackson, who did not consent. The parol agreement between the parties, if made as contended for by the appellant so recently as 1896, is invalid under the statute of frauds. It is extremely doubtful if the government could be bound by such agreement in a case of this character: *Sharp v. Blankenship*, 67 Cal. 441, 7 Pac. 848; *Browne on Statute of Frauds*, sec. 75; *Vosburgh v. Teator*, 32 N. Y. 561; *Jackson v. Long*, 7 Wend. 170.

But as held in *Larson v. Onesite*, 21 Utah, 38, 59 Pac. 234, and *McMaster v. Morse*, 18 Utah, 21, 55 Pac. 70, where adjoining owners and their predecessors in interest occupy land to a given line, and treat such line as a boundary between their respective lots for twenty years, neither can thereafter claim beyond such line.

In Michigan it is held that unless an attempt to settle a doubtful boundary is honestly made, without mistake or fraud, and in view of a question of the true boundary, the statute of frauds will prevent mere acquiescence in the boundary from operating as an estoppel: *Cronin v. Gore*, 38 Mich. 381.

It is also held that a parol agreement long acquiesced in to settle a boundary between adjoining owners, being the result of an honest attempt to fix the true boundary line according to which the parties and their predecessors have actually occupied and made improvements with reference thereto, although the time has not been sufficient to establish a bar under the statute of limitations, will work an estoppel: *Smith v. Hamilton*, 20 Mich. 433, 4 Am. Rep. 398; *Joyce v. Williams*, 26 Mich. 332; *Dupont v. Starring*, 42 Mich. 492, 4 N. W. 190.

²⁷³ The facts in this case do not bring it within either of the rules referred to. After a careful review of the case we find no reversible error in the record.

The judgment of the district court is affirmed, with costs.

Bartch, C. J., and Baskin, J., concur.

MINES—ALIENS.—THE MINERAL LANDS of the government are open to location and purchase only by a citizen of the United States, or one who has declared his intention to become such. Yet after a grant of title is made to an alien, it cannot be attacked by a third party: *Justice Min. Co. v. Lee*, 21 Colo. 260, 52 Am. St. Rep. 216, 40 Pac. 444. And if a claim is located by an alien and conveyed to a citizen, the conveyance vests title in the latter, as between him and another citizen, provided no rights of third persons have attached prior thereto. The question of citizenship, in such cases, can be raised only by the government: *Wilson v. Triumph Consolidated Min. Co.*, 19 Utah, 66, 75 Am. St. Rep. 718, 56 Pac. 300.

IN RE EVANS.

[22 Utah, 366, 62 Pac. 913.]

ATTORNEY AND CLIENT—AGENCY—CONTRACTS.—A person employed to act as agent in securing the services of attorneys cannot contract to receive a part of the fees for himself as assistant attorney. In such case, he cannot be both principal and agent, and such transaction is against public policy and void.

ATTORNEY AND CLIENT—CHAMPERTY.—A stipulation in a contract between attorney and client for the payment by the attorney of the costs of the litigation is against public policy, champertous, and void.

ATTORNEY AND CLIENT—CHAMPERTY—BREACH OF PROFESSIONAL DUTY.—An attorney who, in the pursuit of his profession, makes a champertous agreement which is against public policy, is guilty of a flagrant breach of professional duty.

CHAMPERTY RENDERS ATTORNEYS AMENABLE to the summary jurisdiction of the court, notwithstanding it may be effective as a defense to the enforcement of a contract.

CHAMPERTY—AGREEMENT TO SHARE IN PROCEEDS OF LITIGATION.—While it is permissible for a near kinsman of a poor suitor to assist him in the maintenance of his suit, such kinsman cannot do so as a speculative venture, based upon an agreement to share in the proceeds of the litigation in case the suitor should recover.

ATTORNEY AND CLIENT—DERELICTION OF DUTY. The relation of attorney and client is confidential, and the attorney, by his obligation, is bound to discharge his duties to his client with the strictest fidelity. He is amenable to the summary jurisdiction of the court for any dereliction of duty.

ATTORNEY AND CLIENT—KNOWLEDGE OF DUTIES AND RIGHT TO PLEAD IGNORANCE.—An attorney is presumed to know what his duties are, and cannot plead ignorance, or that in violating a plain duty he did not intend to commit a wrong.

ATTORNEY AND CLIENT—DISBARMENT—EVIDENCE. The summary proceeding in disbarment of an attorney is civil, and not criminal, but in such proceeding more than a preponderance of the evidence is required, and the guilt of the attorney must be clearly established.

Disbarment proceeding on a charge of champerty against Evans and Rogers, copartners in the practice of the law. From facts it appears: "That on or about January 21, 1892, one Charles A. Nelson was killed while traveling on the Southern Pacific Railway at Truckee, California. That the said Charles A. Nelson left surviving him his widow, Nellie Nelson, and two minor children. He also left two brothers, Alfred H. Nelson and Thomas Nelson, surviving him, the latter being a partner in business with the said Charles A. Nelson, at the time of his death. That after

the death of the said Charles A. Nelson, his widow, Nellie Nelson, placed in the hands of said Alfred H. Nelson, who was a practicing attorney at Ogden, Utah, for prosecution, her claim for damages against the Southern Pacific Railway Company, for causing the death of her husband, with authority to employ counsel to prosecute said claim. That the said Alfred H. Nelson employed Evans & Rogers to prosecute said claim against said railway company, and the said Evans & Rogers and Alfred H. Nelson agreed to prosecute an action against the Southern Pacific Railway Company to recover damages from it, on account of the death of Charles A. Nelson, for a contingent fee of one-half of the amount recovered. That Evans & Rogers and Alfred H. Nelson entered into a contract, by the terms of which Evans & Rogers were to receive and retain two-thirds of the one-half of the amount recovered against the Southern Pacific Railway Company, and the said Alfred H. Nelson was to receive the one-third of the one-half of the amount recovered of said company, which amount Evans & Rogers agreed to pay him for services in said case, including the production of witnesses for the prosecution, and they also further agreed to prosecute said cause to final judgment, and also to pay and discharge all of the taxable costs incurred, and also the costs incident to the procuring the attendance of witnesses and all other costs that might be incurred in the prosecution of the cause. That thereafter, Alfred H. Nelson, in contemplation of bringing suit against said railway company, was appointed administrator of the estate of Charles A. Nelson, deceased. That afterward, a contract, having date December 2, 1892, marked 'Exhibit A,' which is in words and figures as follows:

“Ogden, Utah, Dec. 2, 1892.

“We, the undersigned, agree to give Thomas Nelson one-third of one-half of any amounts which may be collected, whether by compromise or otherwise, in the case of Alfred H. Nelson, as administrator of the estate of Charles A. Nelson, deceased, v. Southern Pacific Ry. Co., in consideration of said Thomas Nelson furnishing witnesses necessary to prosecute said case.

“‘EVANS & ROGERS.’

Was entered into by and between Evans & Rogers, and Thomas Nelson, which was substituted for the prior contract between Evans & Rogers and Alfred H. Nelson. That at the time of entering into said contract most of the witnesses and the facts to which they would testify were known to the attorneys.” Other facts appear from the opinion.

A. C. Bishop, attorney general, W. A. Lee, deputy attorney general, and A. Howat, for the state.

D. Evans and O. W. Powers, for the respondents.

377 BASKIN, J. The facts disclosed by the record show, in several respects, a violation of professional ethics on the part of the respondents. It is stated in their brief that "Evans & Rogers did not employ Alfred H. Nelson; the latter employed the former on behalf of the widow and minor children of his deceased brother."

If it be conceded that the widow, for herself and minor children, had the right to authorize Alfred H. Nelson to employ Evans & Rogers as attorneys, when so authorized he could not, under that agency, legally make a contract with them for the payment of a fee one-third of which he was to receive as assistant attorney in the case. No contract for his compensation as attorney could be legally made except with his clients. No one can be both principal and agent in making a contract. A transaction of that kind is against public policy: *Wilbur v. Lynde*, 49 Cal. 290, 19 Am. Rep. 656; *San Diego v. San Diego etc. R. R. Co.*, 44 Cal. 113.

The stipulation in said contract for the payment of the costs of the litigation by Evans & Rogers was against public policy, and rendered the contract champertous, illegal, and void. An attorney who, in the pursuit of his profession, makes an agreement which is so against public ³⁷⁸ policy as the contract herein is guilty of a flagrant breach of professional duty.

When Alfred H. Nelson was appointed administrator his duties as assistant attorney were within the scope of his duties as administrator, and after his appointment as such he was only entitled to such compensation for his services in the case as the court issuing the letters of administration to him might, upon a proper showing, allow; yet, notwithstanding this fact, after he had become involved and left the state and ceased to act as assistant attorney in the case, the contract between Thomas Nelson and Evans & Rogers was entered into, not for the benefit of Thomas Nelson, but for the express purpose of securing to Alfred H. Nelson his share of the fee provided for in his contract with Evans & Rogers.

At the date of the former contract Alfred H. Nelson had not performed the stipulations of his contract, and did not propose to do so. It does not appear that either the widow of Charles A. Nelson or anyone legally authorized to act for the minor children ever knew of the existence of the contract with Thomas Nelson.

Evans & Rogers state in their answer that when Thomas Nelson failed to perform his contract "it became and was necessary for the widow of the deceased, Charles A. Nelson, to secure and advance money for their attendance." Evans & Rogers did not, as they had contracted to do with Alfred H. Nelson, pay the costs of the litigation. For what they contracted to do in the premises they were to receive only two-thirds of one-half of the amount which might be recovered from the railroad, yet notwithstanding they failed to do all they promised, on the distribution of the funds, they not only put into their own pockets the whole of the fee which they, under the contract, were to receive, but also the fee which Alfred H. Nelson was, under the agreement, ³⁷⁹ to receive through Thomas Nelson, amounting to seventeen hundred and ninety-three dollars and thirty-three cents, although the services for which one-third of one-half of the recovery was to be paid were never rendered. Certainly, Evans & Rogers were not entitled to more than the amount of the fee, which they, by the contract, were to receive. They were not entitled to more than that sum on a quantum meruit, as in an action to recover on a quantum meruit, notwithstanding their said contracts were void as against public policy and also void for champerty, their recovery would have been limited to the valuation which they themselves attached to their services in said contracts: Weeks on Attorneys, 702, note 1.

Neither Alfred H. Nelson or Thomas Nelson were entitled to receive any part of the amount recovered under said contract; therefore, as under the provisions of section 2912 of the Revised Statutes, the widow and minor children of Charles A. Nelson were the beneficiaries of the action against the railroad company, they were entitled to the sum of seventeen hundred and ninety-three dollars and thirty-three cents which Evans & Rogers received as an addition to their legitimate fee. This fact is now conceded in the following language of respondent's brief, to wit: "If Thomas Nelson did not perform the consideration he promised, viz., secure the attendance of the nonresident witnesses, then Evans & Rogers, who by that contract were made trustees of one-third of one-half of the recovery, would have been grossly derelict in duty, violating the rights of their clients, the real beneficiaries, had they paid said Thomas."

It appears from the record that Alfred H. Nelson, the administrator, was absent from the state when the order of distribution was made, and while it does not in express terms appear that Evans & Rogers obtained the order of distribution, it is infer-

able that they did. Whether ³⁸⁰ they did or did not procure that order, they knew its provisions and received one-half of the recovery, with full knowledge of all the facts in the case. Neither does it appear that the widow or anyone legally qualified to act for the minor children appeared or was represented in the proceeding in which said order was granted, or that Evans & Rogers advised the widow, or any representative of the minor children, that the widow and minor children were entitled to seventeen hundred and ninety-three dollars and thirty-three cents more than allowed them in the order of distribution.

In support of the demurrer to the complaint in the case of *Thomas Nelson v. Evans & Rogers*, on the appeal in this court, A. G. Horne, as attorney of David Evans, presented on the argument a brief in which was cited, among other cases, *Croco v. Oregon Short Line Ry. Co.*, 18 Utah, 321, 54 Pac. 895, and *Lyon v. Hussey*, 82 Hun, 15, 31 N. Y. Supp. 281.

In the former case this court decided that "under section 3683 (Utah Comp. Laws) it was competent for an attorney and client to agree upon the attorney's compensation, and such compensation may be made contingent upon success, and payable by percentage or otherwise out of the proceeds of the litigation. But it is not competent for the attorney, in consideration thereof, to agree to pay the advance fees and costs of suit thereafter to be commenced."

The contract upon which this decision was based was one made by Evans & Rogers, in which they had agreed, in consideration of receiving forty per cent of the recovery in that case, to render their services as attorneys, and in addition thereto to pay the costs required to be advanced to the clerk, and to the sheriff for serving the summons, and whatever might be necessary to pay the fare of witnesses from Idaho to the place of trial.

By this citation this court's attention was directly called to the fact that the present instance is not the only one in ³⁸¹ which the respondents have made champertous contracts in the pursuit of their profession as attorneys.

In the last-mentioned case of *Lyon v. Hussey*, 82 Hun, 15, 31 N. Y. Supp. 281, Mr. Justice O'Brien, in his opinion at special term, said: "It is true that champerty and maintenance are abolished in this state except so far as preserved by the Revised Statutes, and what remains would not literally touch an agreement such as is here sought to be enforced. Apart, however, from any statutory prohibition, there can be no question but that such an agreement would have been void at common law; and in addition to the illegality under the early

statutes in this state relating to maintenance and champerty, such an agreement was made a crime. The penalty with the offense having been repealed, and no express statute existing which in terms decrees that an agreement of the character alleged is illegal, it yet remains to be determined whether such an agreement can be enforced. Having in mind the fact that it is void at common law, I do not see upon what ground its legality can be placed, unless some express sanction or authority can be found in some statute or decision which would give it support. Such agreements directly tend to promote litigation, to disturb the peace of individuals, and are directed to subverting the settled policy of this state, which, as shown by the history of the enactments on the subject, more particularly those applicable to attorneys (sections 73 and 74' of the code), has sought to prevent the stirring up of strife and litigation. Hence, concededly, an entire stranger to the transaction obtruded himself into it, and not only instigated a suit, but agreed to procure counsel and maintain the suit, the fruits of which, if successful, he was to share; and more than this, he undertook to furnish the evidence upon which the recovery was ³⁸² to be assured. Such an agreement is repugnant to every instinct of propriety and justice, and the portion of it which provides for pay as a consideration for procuring evidence should be regarded as immoral, illegal, and void."

And Mr. Justice Van Brunt, on the appeal of the case from the special term, said: "It may not be necessary to add anything to the opinion which was handed down upon the decision of the demurrer in the court below; but it may be proper to call attention to the fact that part of the contract, damages for breach of which this action was brought to recover, was to furnish evidence to establish the claim of defendant in a litigation to be commenced. It is clear that such a contract is against public policy. The recognition of contracts of this character would be the introduction of all sorts of fraud and deception in proceedings before courts of justice, in order that parties might receive compensation out of the results of their successful manufacture of proofs to be presented to the court, thus holding out a premium upon subornation. The mere statement of the proposition seems to show that such contract should never be recognized in any court of justice. The judgment should be affirmed, with costs."

In the above case the champertous contract was made by a layman with the plaintiff. Such contracts when made by an

attorney at law, in pursuit of his profession, are still more obnoxious.

On the authority of the two cases thus cited, and others of the same import, cited in said brief, we sustained the demurrer. If the respondents had refused to pay the claim made by Thomas Nelson, and defeated a recovery for the purpose of protecting the interests of the widow and minor children, it would have been a strong, mitigating circumstance in their favor. But such was not their ³⁸³ intention. The facts in the case conclusively show that they resisted the claim of Thomas Nelson in order that they might retain for themselves the amount sought to be recovered. In respondent's answer they failed to state that it was their intention to protect their clients, or that even now they intend to pay them the amount withheld from them in the disbursement heretofore mentioned. The declaration in the respondent's brief that they were made trustees of that amount for their clients, the real beneficiaries, was evidently an afterthought. At the argument before us, when the attention of respondent's counsel was called to that declaration, one of them, in the presence of one of the respondents, and in the face of the patent facts disclosed in the case, and notwithstanding his name was attached, as an attorney, to said brief, disputed that declaration, and declared that the respondents were entitled to retain the whole sum distributed to them; and although the respondent, who was present, had personally appeared and made an argument on the demurrer to the information, he failed to interpose any objection to the claim of his attorney, or declare that it was then, or ever had been, his intention, or the intention of his co-respondent, to pay to their clients said amount of seventeen hundred and ninety-three dollars and thirty-three cents, withheld from them in the distribution of the funds.

It appears from the evidence, and the referee found, that Alfred H. Nelson and Thomas Nelson were brothers of the deceased, Charles A. Nelson. These facts were not disclosed in the case of Thomas Nelson v. Evans & Rogers, but were presented to this court for the first time in the answer and evidence of respondents in the pending matter, and they now contend that these additional facts show that this contract with Thomas Nelson was not champertous. If this were conceded, then the respondents stand before this court, confessing that they ³⁸⁴ induced this court to render a final judgment in their favor on the ground of having been guilty of champerty, when they knew they were innocent. The impropriety of such an attitude is indefensible.

As a general rule, no one will be permitted to plead his own wrong in defense of an action; but in transactions which are prohibited by law, or are against public policy, such a defense, as it tends to discourage such transactions, is permissible. Such a defense, however, when sustained, does not condone the wrong, but merely leaves the parties in statu quo, and prevents either of the guilty parties from obtaining any relief in the courts of justice. "Champerty renders an attorney amenable to the summary jurisdiction of the court" (Weeks on Attorneys, secs. 87, 88, 350), notwithstanding it may be effective as a defense to the enforcement of a contract.

We are of the opinion that notwithstanding Alfred H. Nelson and Thomas Nelson were brothers of the deceased, under the facts disclosed the contract between Thomas Nelson and Evans & Rogers is champertous.

While it is permissible for a near kinsman of a poor suitor, out of charity, to assist him in the maintenance of his suit, such kinsman cannot do so as a speculative venture, based upon an agreement to share in the proceeds of the litigation in case the suitor should recover. Both the law of maintenance and champerty forbid the meddling by any person, not a party to the suit, whatever may be his relation to the suitor, for the purpose of speculation or profit.

It is clear that the contract with Thomas Nelson was entered into for the benefit of Alfred H. Nelson, the administrator. Its object was to indirectly obtain for Alfred H. Nelson a share of the fruits of the litigation as an attorney's fee, which it was not intended he should ³⁸⁵ earn. The transaction was an attempt on the part of Alfred H. Nelson and Thomas Nelson to secure a profit from the death of their brother to the detriment of his widow and minor children. The widow and minor children were not parties to the contract, and it does not appear that they were ever informed or knew of its existence.

This contract was not only champertous, but also obnoxious, because it was against the interests of the widow and minor children, and was entered into by their attorneys, whose obligations as such required them to regard the interests of their clients with strict fidelity.

The respondent, David Evans, testified that he knew nothing about the demurrer until Mr. Rogers, or some one else, told him that it had been sustained. Mr. Rogers testified that he knew the demurrer was interposed, but supposed that "it was a time server": that after it had been sustained he learned from Mr. Williams that the district court had sustained it on the

ground that the contract on its face was champertous; that he thereupon stated to Mr. Williams that he did not want to make that defense, but would rely on the nonperformance of the contract by Thomas Nelson.

It further appears from the evidence that afterward Mr. Rogers proposed to Mr. Williams, who was the attorney for Thomas Nelson, that the judgment on the demurrer should be vacated, the demurrer withdrawn, and an answer should be made raising an issue on the merits, and that a stipulation to that effect, in which Mr. Evans was willing to join with Mr. Rogers, was drawn up and presented to Mr. Williams, who declined to enter into the proposed stipulation. When the case was reached in this court on appeal, A. G. Horne, the attorney for the respondents, at the request of Mr. Rogers, withdrew his appearance ³⁸⁶ for him, but not for Mr. Evans. Both of the respondents were aware that the only tenable ground of the demurrer was the champertous character of the contract, in the form in which it was set out in the complaint.

The respondent Rogers must have been aware that the said withdrawal would not withdraw the question of champerty from consideration, but that that could only be done by the joint action of both respondents. Both respondents are able attorneys, and of long experience in the practice of law, and if the question of champerty presented by their attorney was contrary to their wishes, and was made in the first instance without their knowledge, and they were still desirous of withdrawing the question from further consideration, and having the judgment set aside for the purpose of trying the case on its merits, this end could have readily been accomplished by stating to this court, either through their attorney or personally, that the contract, on account of facts not disclosed by the complaint, was not in fact champertous, and that their attorney had raised that question without their knowledge and against their wishes, and requested a reversal of the judgment. If this had been done this court would not have hesitated to grant the request. But even if this course had been pursued it would not have changed either the character of the contract or the acts of the parties, which the evidence before us has fully disclosed.

The relation of attorney and client is confidential. The attorney by his obligation is bound to discharge his duties to his client with the strictest fidelity. He is not permitted to do anything himself, or permit anything to be done in the pursuit of his employment, which he is able to prevent, against the interests of his client. He is amenable to the summary jurisdic-

tion of the court for dereliction of duty, not for the purpose of punishment, ³⁸⁷ "but for the protection of the court, the proper administration of justice, the dignity and purity of the profession, the public good, and the protection of clients": *State v. Finn*, 32 Or. 519, 67 Am. St. Rep. 550, 52 Pac. 756; *Ex parte Wall*, 107 U. S. 273, 2 Sup. Ct. Rep. 569. He is presumed to know what the duties of an attorney are, and cannot plead ignorance, or that in violating a plain duty he did not intend to commit a wrong. The summary proceeding of disbarment is civil, and not criminal: 6 Ency. of Pl. & Pr. 709; *Matter of Randall*, 159 N. Y. 219, 52 N. E. 1106; *State v. Clark*, 46 Iowa, 155. In that proceeding, however, more than a preponderance of the evidence is required. The guilt of the attorney must be clearly established.

Thomas Nelson stated, and the referee found, that he instituted these proceedings with the hope that it would force the respondent to pay his claim. While this fact might detract from or neutralize the force of his testimony, it cannot excuse the wrongful acts of the respondents.

There is no conflict in the testimony regarding the facts found by the referee, except No. 16, or the additional facts enumerated and found by us. These facts conclusively show that the respondents have violated their duties in the several respects mentioned in this opinion.

In *Bradley v. Fisher*, 13 Wall. 355, Mr. Justice Field, in the opinion, said: "Admission as an attorney is not obtained without years of labor and study. The office which the party thus acquires is one of value, and often becomes the source of great honor and emolument to its possessor. To most persons who enter the profession, it is the means of support to themselves and their families. To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family. A removal from the bar should, therefore, never be ³⁸⁸ decreed where any punishment less severe—such as reprimand, temporary suspension, or fine—would accomplish the end desired."

In view of the facts thus stated and the facts that the respondents have for a long time maintained good standing before the courts of this state, and are men of good morals, we do not think they should be absolutely disbarred, but that a judgment similar to that rendered in *In re Tyler*, 71 Cal. 358, 12 Pac. 289, 13 Pac. 169, 78 Cal. 307, 12 Am. St. Rep. 55, 20 Pac. 674, under a statute relating to attorneys, of which the statute of this state on that subject is a transcript, and similar to the one un-

der which the case of *Slemmer v. Wright*, 54 Iowa, 164, 6 N. W. 181, was rendered, should be entered.

It is, therefore ordered and adjudged that each of the respondents be deprived of the right to practice as attorney or counselor at law in any and all of the courts of this state until they shall have deposited, or caused to be deposited, with the clerk of this court, subject to the order of this court, the sum of seventeen hundred and ninety-three dollars and thirty-three cents, with interest thereon, at the rate of eight per cent per annum, from the twenty-eighth day of December, 1898, up to the date of the deposit, for the use and benefit of the widow and minor children of Charles A. Nelson, and pay the costs of this proceeding, including the special master's fee of one hundred and seventy-five dollars, and the stenographer's fee of fifty-four dollars and forty cents. And if they fail, within sixty days from the date of the entry hereof, to show to this court that they have made such deposit and paid the costs, that then an order be made and entered permanently disbarring each of the respondents and directing that their names be stricken from the roll of attorneys and counselors at law.

Miner, J., concurs.

389 BARTCH, C. J. I concur in the judgment herein, the same, so far as it goes, being in accord with my views. I am of the opinion, however, from an examination of the brief filed on behalf of the respondents and of the record, the infliction of some punishment, other than the mere payment of money by the respondents, which, as now appears from their brief, is admittedly due from them, would be warranted and justified. Where an attorney is guilty of deliberately violating the confidence reposed in him by the court and his duty to his client, the punishment ought to be commensurate with his wrongdoing. The dignity of the court, the purity of the profession, the peace of individuals, the protection of clients, and the public good alike demand this.

CHAMPERTY IS AN AGREEMENT to prosecute at one's own risk and expense, and take part of the thing received in compensation: *Weakley v. Hall*, 13 Ohio, 167, 42 Am. Dec. 194. See, too, *Roberts v. Yancy*, 94 Ky. 243, 42 Am. St. Rep. 357, 21 S. W. 1047; *Hamilton v. Gray*, 67 Vt. 233, 48 Am. St. Rep. 811, 35 Atl. 315. But a contract between an attorney and client for a contingent fee may be valid and not champertous: *Davis v. Webber*, 66 Ark. 190, 74 Am. St. Rep. 81, 49 S. W. 822.

THE LAW OF MAINTENANCE IS INTENDED only to prevent interference in a suit by strangers having no interest in the

litigation, and standing in no relation of duty to a sutor: *Thalhimer v. Brinckerhoff*, 3 Cow. 623, 15 Am. Dec. 308. One who has a pecuniary interest in a suit, or is related to either of the parties, may rightfully assist in its prosecution or defense. But it has been held that a son cannot make a financial speculation out of his filial duty: See the monographic note to *Thalhimer v. Brinckerhoff*, 15 Am. Dec. 319.

DISBARMENT OF ATTORNEYS is the subject of an extended note to *In re Philbrook*, 45 Am. St. Rep. 71-86.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

TROWBRIDGE v. SPINNING.

[23 Wash. 48, 62 Pac. 125.]

JUDGMENT OF SISTER STATE—ACTION ON—JUDICIAL NOTICE OF LOCAL LAWS.—When a judgment for alimony, rendered in a sister state, is sued upon here, the courts of this state take judicial notice of the local laws of the state from which the record of the judgment comes.

JUDGMENT OF SISTER STATE—PLEADING.—It is not necessary, in an action upon the judgment of a sister state, rendered, as alleged in the complaint, by a court of general jurisdiction, to allege jurisdictional facts.

JUDGMENT OF SISTER STATE—JUDICIAL NOTICE OF JURISDICTION.—In an action upon a judgment for alimony rendered, as shown by the complaint, "in the circuit court of the city of St. Louis," in the state of Missouri, a court of this state will take judicial notice that the Missouri court had jurisdiction to render the judgment alleged.

JUDGMENT OF SISTER STATE FOR ALIMONY—WHEN FINAL.—A judgment for alimony, rendered in a sister state, is final, and will be so regarded in this state, where it allows a gross sum to the wife, although the court which rendered it has power, under the statute, on the application of either party, to make such alteration from time to time, respecting the allowance of alimony, as may be proper.

ATTACHMENT—GARNISHMENT—OWNER OF SAFE DEPOSIT VAULT IS SUBJECT TO.—Under a statute requiring a garnishee to answer as to any personal property of the defendant, "under his control," a bank which has rented a box in a safety deposit vault therein to the defendant is subject to garnishment, where the boxes in the vault can be opened only by two keys, one a master's key in the possession of the bank, and the other a private key, in the box renter's possession. The garnishee, in such a case, has "control" of the contents of the box, though it may be impossible for him to answer specifically as to the contents thereof, and, as the court may inquire into the contents of the box by caus-

ing the defendant to be examined as a witness, the garnishee should retain the exclusive control thereof until he is discharged by the court.

E. F. Blaine and Tucker & Hyland, for the appellant.

John G. Gray and John N. Perkins, for the respondent, Spinning.

George E. de Steiguer, for the respondent, the National Bank of Commerce.

52 WHITE, J. The amended complaint in this action omitting the formal parts, is as follows:

"That at all the times herein mentioned the circuit court of the city of St. Louis, in the state of Missouri, was, and ever since has been, and now is, a court of general jurisdiction over matters in equity and law, duly organized, and existing under and by virtue of the laws of said state. That on the twenty-fifth day of June, 1895, the defendant ⁵³ above named, Fred M. Spinning, commenced an action in said circuit court of the city of St. Louis, as plaintiff, against Lillie M. Spinning, she being the plaintiff here, who at that time was the wife of said Fred M. Spinning, as defendant, by filing his petition therein, which said action was entitled as follows, to wit: 'In the circuit court of the city of St. Louis, October, 1895, Fred M. Spinning, plaintiff, v. Lillie M. Spinning, defendant.' That upon the filing of said petition the clerk of said court, on the twenty-fifth day of June, 1895, duly issued a summons, commanding the defendant therein, who is the plaintiff herein, to appear before the judges of said circuit court on the first day of the next term thereof, to be held in the city of St. Louis at the courthouse in said city, on the first Monday of October, next following, the day of the issuance thereof, then and there to answer the complaint of Fred M. Spinning as set forth, a copy of which was attached to said summons, and said summons was duly sealed with the seal of said court and attested by the clerk on said day, and thereafter was duly served upon the defendant herein named, personally, at the city of St. Louis, in the state aforesaid, by the sheriff of said county, by delivering a copy thereof with a copy of said petition to said defendant, personally, she being the plaintiff herein.

"That after the service of process upon said defendant, the plaintiff herein, said Lillie M. Trowbridge, appeared by her attorney William McNamee, and in person and thereafter such proceedings were had and done therein that said Lillie M.

Trowbridge, then Lillie M. Spinning, filed her answer and cross-complaint in said action against the said Fred M. Spinning, wherein she alleges that she was the injured person, praying, among other things, that she was entitled to a decree of divorce and for her costs and alimony; that thereafter, and on the twenty-ninth day of January, 1896, such other and further proceedings were had in said action, that a trial thereof was had on said day, wherein and whereby said court ordered, decreed and rendered judgment therein against the said Fred M. Spinning, granting the defendant therein a complete decree of divorce, she being the plaintiff here, together ⁵⁴ with judgment against said Fred M. Spinning for the sum of five thousand dollars, as and for alimony in gross, and further ordered, adjudged, and decreed that said Fred M. Spinning pay the costs of said proceeding, and that execution issue thereof; and that said decree was duly made, entered, enrolled, and docketed in said court dissolving the bonds of matrimony and rendering judgment as aforesaid, and that no part of said judgment and decree has ever been paid.

"That under and by virtue of the provisions of the Revised Statutes of the state of Missouri, chapter 28, page 360, of volume 1, for the year 1879, such judgment and decree rendered as aforesaid has the force and effect of a judgment at law for the payment of money. That such is the construction thereof and the force and effect to be given to the same, as determined by the supreme court of said state of Missouri, and such is the law of said state. That by reason thereof plaintiff is advised and believes, and therefore alleges, the fact to be, and that under and by virtue of the constitution of the United States, section 1, article 4, she has a good right to bring her cause of action as aforesaid in the courts of the state of Washington, and to have and recover of the said defendant the sum of five thousand dollars awarded to her as aforesaid, and that the courts of the state of Washington will give the same force and effect to said decree as is given thereto in the state of Missouri.

"Plaintiff hereby refers to sections 2179, 2180, 2184, 2185, of volume 1 of the Revised Statutes of the state of Missouri, 1879, and attaches hereto full and complete copies of said sections aforesaid, the same being marked as exhibit 'A,' and made a part and parcel thereof, to all intents and purposes as fully as though copied at length herein."

The sections of the Revised Statutes of the state of Missouri referred to in section 4 of the complaint are as follows:

"Sec. 2179. When a divorce shall be adjudged, the court shall make such order touching the alimony and maintenance of the wife, and the care, custody, and maintenance of the children, or any of them, as from the circumstances ⁵⁵ of the parties and the nature of the case shall be reasonable, and when the wife is plaintiff, may order the defendant to give security for such alimony and maintenance; and upon his neglect to give the security required of him, or upon default of himself and his securities, if any there be, to pay or provide such alimony and maintenance, may award an execution for the collection thereof or enforce the performance of the judgment, or order by sequestration of property, or by such other lawful ways and means as is according to the practice of the court. The court, on the application of either party, may make such alteration from time to time as to the allowance of alimony and maintenance as may be proper, and the court may decree alimony pending the suit for divorce in all cases where the same would be just, whether the wife be plaintiff or defendant, and enforce such order in the manner provided by law in other cases.

"Sec. 2180. Upon a decree of divorce in favor of the wife, the court may, in its discretion, decree alimony in gross or from year to year. When alimony is decreed in gross such decree shall be a general lien on the realty of the party against whom the decree may be rendered, as in the case of other judgments. When a decree is for alimony from year to year, such decree shall not be a lien on the realty as aforesaid, but an execution in the hands of the proper officer, issued for the purpose of enforcing such decree, shall constitute a lien on the real and personal property of the defendant in such execution so long as the same shall lawfully remain in the possession of said officer unsatisfied."

"Sec. 2184. No final judgment or order rendered in cases arising under this chapter shall be reversed, annulled, or modified in the supreme or any other court by appeal or writ of error, unless such appeal shall have been granted during the term of court at which the judgment or order appealed from was rendered, or unless such writ of error shall have been issued within sixty days after the order was made or judgment was rendered.

"Sec. 2185. No petition for review of any judgment for divorce in any case arising under this chapter shall ⁵⁶ be allowed, any law or statute to the contrary notwithstanding; but there may be a review of any order or judgment touching the alimony and maintenance of the wife, and the care, custody, and maintenance of the children, or any of them, as in other cases."

The prayer of the complaint was for judgment against the defendant, Fred M. Spinning, for the sum of five thousand dollars, with interest thereon from the twenty-sixth day of January, 1896, at the rate of six per cent per annum, and for costs, etc. The respondent, Spinning, demurred to this complaint, on the ground that the same did not state facts sufficient to constitute a cause of action against him. This demurrer, upon hearing, was sustained, and judgment was entered dismissing the action. On September 6, 1899, at the time the plaintiff filed her original complaint in the superior court of King county, state of Washington, a writ of garnishment was issued and served upon the Washington National Bank, First National Bank, National Bank of Commerce, Seattle Safe Deposit Vaults, Incorporated—all of the city of Seattle—as garnishee defendants. All of the garnishee defendants appeared, and the Seattle Safe Deposit Vaults, Incorporated, and the Washington National Bank denied generally, and these answers were controverted. The First National Bank admitted that it had on deposit the sum of two hundred and sixty-six dollars and nineteen cents, to the credit of the respondent. The garnishee defendant, the National Bank of Commerce, answered, stating that the respondent had in its vaults a safe deposit box, to which there was a private and a master's key, the private key being in the possession of the respondent and the master's key in the possession of the garnishee defendant; and to open said box it is necessary, first, for the master's key to be used; second, for the private key to be used; that the contents of the box were unknown to the garnishee defendant. To the vault there was a vault door, locked ⁵⁷ by a time combination, which was under the exclusive charge of the garnishee defendant.

Upon the issues formed by the answer of the garnishee defendant the National Bank of Commerce, proof was taken; and the court made findings of fact and conclusions of law, and discharged said garnishee defendant, and to said conclusions of law the appellant excepts. This order was made prior to the sustaining of the demurrer to the amended complaint. At the time of the sustaining of the demurrer to the amended complaint an order was made discharging all of the garnishee defendants. From said order and the sustaining of said demurrer to the amended complaint and the judgment dismissing said action, this appeal is taken. The findings of fact and conclusions of law in relation to the garnishment against the National Bank of Commerce are as follows:

"That on the fourteenth day of October, 1898, said garnishee rented of said defendant, for one year, a compartment and box in the safety deposit vaults of the said garnishee; and the time of said renting gave to said defendant a receipt, of which the following is a copy, to wit:

"No. 531.

Seattle, Wash., Oct. 14, 1898.

"Received of Fred M. Spinning the sum of three and 25-100 dollars in payment of rent for Safety Deposit Box No. 80 from Oct. 14, 1898, to Oct. 14, 1899.

"THE NATIONAL BANK OF COMMERCE.

"By W. H. WRIGHT.

"Read agreement on back."

"On the back of which receipt was the following indorsement, to wit:

"Read this Agreement.

"It is understood and agreed by and between the National Bank of Commerce and the lessee that in case of the loss of the key of said box, it will be replaced only at the expense of the lessee, and the National Bank of Commerce shall not be responsible in any way for such ⁵⁸ loss. It is further understood and agreed by and between the National Bank of Commerce that said bank may refuse access to said box to any agent of the lessee not regularly designated by an instrument in writing filed with the bank."

"2. That the said defendant, ever since the said fourteenth day of October, 1898, has continued to hold said box and compartment under said contract and lease.

"3. That said box is an ordinary tin box inclosed within said compartment, and said compartment is closed with a door fitted with a lock. At the time of renting said box and compartment, the garnishee delivered to the defendant two duplicate keys. The method of opening said box and compartment is as follows: Said garnishee, through one of its employes, turns in said lock what is known as a 'master's key,' after which the keys furnished to the defendant will unlock the lock of said compartment and permit the same to be opened. Said 'master's key' will not unlock said lock. Said garnishee did not retain, and has not now, and has not at any time, since renting said box and compartment, had any key whatsoever, with which to open the said box or compartment, and has not now, and has not at any time since renting said box and compartment, had any means of opening or obtaining access to said compartment or box.

"4. Said master's key is not used for the purpose of giving said garnishee access to said box or compartment, but as a check

on fraud and imposture, and to prevent unauthorized persons having access thereto.

"5. Said garnishee has no information or knowledge as to what, if any, the contents of said box and compartment is, and no evidence has been introduced as to what such contents are, or whether said box contains anything, save and except to the effect that the garnishee has been informed by the defendant that there are in said box papers belonging to other persons than the defendant.

"6. Said garnishee has no means of ascertaining the contents of said box and compartment, and has no information, and is unable to ascertain whether or not said box and compartment contain anything subject to execution, attachment, garnishment, or anything whatsoever.

"7. That the sum of fifty dollars (\$50) is a reasonable sum to be allowed the garnishee as an attorney's fee.

"8. At the time of the service of said writ said garnishee was not, and has not since been, indebted to defendant, nor has it had in its possession or under its control, any property or effects of defendant except as above set forth.

"CONCLUSIONS OF LAW.

"From the foregoing facts, the court concludes, as a matter of law, that the garnishee, the National Bank of Commerce, is entitled to judgment discharging it upon its said answer, and for its costs against the plaintiff, including a reasonable attorney's fee, to wit, the sum of fifty dollars (\$50)."

The errors assigned are as follows: "1. The court erred in sustaining the demurrer to the amended complaint; 2. The court erred in discharging the garnishee defendant, the National Bank of Commerce; 3. The court erred in discharging the other garnishee defendants."

The first point urged by the respondent against this complaint is that the authority of the circuit court of the city of St. Louis in proceedings for divorce and alimony is not shown or alleged in this complaint. It is alleged that the circuit court of the city of St. Louis at all the times mentioned in the complaint was, and is, a court of general jurisdiction over matters in equity and law, duly organized and existing under and by virtue of the laws of Missouri. "Questions of divorce and alimony," says the learned counsel for the respondent Spinning, "are regulated by statutory provisions only, and the jurisdiction of courts over them cannot be extended beyond the statute authority. Proceedings in such matters are not according to

the course of the common law, and there is no presumption in favor of the regularity of courts of general jurisdiction in such cases."

⁶⁰ Where a question arises under that part of the constitution of the United States and the act of Congress which requires full faith and credit to be given in each state to the public acts, records, and judicial proceedings of every other state, our courts will take judicial notice of the local laws of the state from which the record comes: *State v. Hinchman*, 27 Pa. St. 483; *Paine v. Schenectady Ins. Co.*, 11 R. I. 415; *Rae v. Hulbert*, 17 Ill. 576.

The supreme court of Pennsylvania, where the question was as to the jurisdiction of the probate courts of Ohio, in *State v. Hinchman*, 27 Pa. St. 483, says: "The questions before us arise under the constitution and laws of the United States. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, says the federal constitution, and the act of Congress of 26th May, 1790, providing for the mode of authenticating the records and judicial proceedings, of the state courts, declares that 'the records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.'

"A judgment of this court, adverse to the right arising out of the federal constitution and legislation, would be reviewable in the supreme court of the United States, and there the states of the confederacy are not regarded as foreign states, whose laws and usages must be proved, but as domestic institutions, whose laws are to be noticed without pleading or proof. It would be a very imperfect and discordant administration for the court of original jurisdiction to adopt one rule of decision, while the court of final resort was governed by another; and hence it follows that in questions of this sort, we should take notice of the local laws of a sister state in the same manner the supreme court of the United States would do on a writ of error to our judgment: *Ferguson v. Harwood*, 7 Cranch, 408; *Mills v. Duryee*, 7 Cranch, 481; *Hampton v. McConnell*, 3 Wheat. 234; *Baxley v. Linah*, 16 Pa. St. 243, 55 Am. Dec. 494."

⁶¹ The supreme court of Illinois, in *Rae v. Hulbert*, 17 Ill. 576, says: "While for many, if not for most, purposes, the several states of the Union are, as to each other, considered and

treated as foreign states, yet it is not strictly so as to the judgments rendered by their several courts. I will not quote from the constitution and laws of the federal government, but from the opinion of this court in the case of *Welch v. Sykes*, 3 Gilm. 199, 44 Am. Dec. 689. It is there said: 'Under the constitution of the United States, and laws made in pursuance thereof, the judgments in personam of the various states are placed on the footing of domestic judgments, and they are to receive the same credit and effect, when sought to be enforced in different states, as they, by law or usage, have, in the particular states where rendered.' We are, then, to treat this judgment, or give it the same effect, as if rendered by one of our own courts, or as if this were a proceeding in New York.

"We do not hesitate to declare that it is our duty to take notice that the supreme court of New York had jurisdiction of the subject matter; and the same presumptions arise in favor of the jurisdiction of the person and of the regularity of the proceeding that would arise upon a domestic judgment. How far those presumptions arise in favor of the jurisdiction of the person it is not necessary now to discuss particularly, for that is a question rather of evidence than of pleading. Though it may be necessary when used as evidence, that the record should show such facts as are necessary to give the court jurisdiction of the person of the defendant, or, at least, as raise a presumption of jurisdiction, yet it is not necessary that such facts should be set out in the pleading. It is only necessary to aver that, by the consideration of the court, a judgment was rendered against the defendant. The implication is, that it was a valid judgment, and that is sufficient to lay the foundation for the proof of every fact necessary to show that it was a valid judgment."

The supreme court of Wisconsin, in *Kunze v. Kunze*, 94 Wis. 54, 59 Am. St. Rep. 857, 68 N. W. 391, which ⁶² was an action to recover alimony adjudged to the plaintiff in a divorce action brought in Illinois, says: "This is an action brought to recover alimony adjudged to the plaintiff in a divorce action heretofore brought in Illinois. It appears by the complaint that the court in which the divorce action was brought, i. e., the circuit court of Cook county, Illinois, was a court of general jurisdiction, as its name indicates; hence it was unnecessary to allege any jurisdictional facts: *Jarvis v. Robinson*, 21 Wis. 523, (530), 94 Am. Dec. 560. The allegations that the judgment was rendered in that court, and that it was afterward duly amended, are sufficient in the first instance. From these facts

jurisdiction is presumed. If, in fact, there was any want of jurisdiction, it is a fact to be set up by answer: *Jarvis v. Robinson*, 21 Wis. 523, (530), 94 Am. Dec. 560."

For the reasons given in these decisions, which we think are sound, we take judicial notice that the circuit court of the city of St. Louis had jurisdiction to render the judgment alleged.

It is further objected that the appellant alleges that she filed her answer and cross-complaint, but she fails to allege that the same was served. This objection is also answered in the quotation from the cases of *Rae v. Hulbert*, 17 Ill. 576, and *Kunze v. Kunze*, 94 Wis. 54, 59 Am. St. Rep. 857, 68 N. W. 391. Besides, we take judicial notice that, under the laws of Missouri, in all suits for divorce the defendant may set up in defense to the action in the answer any facts which, if proved, would entitle the defendant to a divorce, and in such answer pray to be divorced from the plaintiff, and on the hearing of the cause the court can grant the defendant a divorce, if satisfied the defendant was the injured party: 1 Mo. Rev. Stats. 1879, sec. 2176. The complaint sufficiently alleges that she appeared in the action and filed her answer, alleging she was the injured person, praying for the decree, etc., and that such proceedings in the action were had that she obtained the judgment ⁶³ alleged. Whether the answer was served or not is immaterial. That is a mere matter of practice. It was filed, and the allegations of the complaint are sufficient to admit proof by exemplified copy of the record of the issues tried, and upon which the judgment was rendered.

The principal contention of the respondent, Spinning, is that the judgment of five thousand dollars, as for alimony in gross, given by the circuit court of the city of St. Louis, is not a final judgment, because the statute of Missouri provides that the court, on the application of either party, may make such alteration from time to time as to the allowance of alimony as may be proper; that the judgment of a sister state cannot be sued upon in this state unless it is final and conclusive in the state where it was rendered, according to the law of that state. We are now called upon to determine a question arising under the constitution and laws of the United States, and we should look as far as possible to the decisions of the federal courts for guidance. The case of *Barber v. Barber*, 21 How. 582, decided by the supreme court of the United States in 1858, as we view it, is decisive of this case. That was a case arising under a suit in equity in the district court of the United States for the district of Wisconsin, wherein by the decree, the wife, by her next friend,

the plaintiff in the suit, was awarded a judgment for five thousand nine hundred and thirty-six dollars and eighty cents on a decree of divorce from bed and board given by the state courts of New York, and decreeing alimony to the wife in the annual sum of three hundred and sixty dollars in each and every year. The respondent, Spinning, insists, however, that under the laws of New York the decree for alimony in that case was final, and that that case must be distinguished from the one at bar. The precise point insisted upon here was undoubtedly before the supreme court of the United States ⁶⁴ and considered in that case. In the dissenting opinion of Justice Daniel he says: "The second error in the position before mentioned is shown by the character and objects of the allowance made as alimony to a wife. This allowance is not in the nature of an absolute debt. It is not unconditional, but always dependent upon the personal merits and conduct of the wife—merits and conduct which must exist and continue, in order to constitute a valid claim to such an allowance. This allowance might unquestionably be forfeited upon proof of criminality or misconduct of the wife, who would not be permitted to enforce the payment of that to which it should be shown she had lost all just claim, and this inhibition, it is presumed, might embrace as well a portion of that allowance at any time in arrears, as its demand in future. The essential character, then, of this allowance, viz., its being always conditional and dependent, both for its origin and continuation, upon the circumstances which produced or justified it, is demonstrative of the propriety and the necessity of submitting it to the control of that authority whose province it was to judge of those circumstances. That authority can exist nowhere but with the power and the right to control the private and domestic relations of life. The federal government has no such power; it has no commission of censor morum over the several states and their people": *Barber v. Barber*, 21 How. 603.

And it is said in the opinion of the majority of the court that "alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is." From this it would seem that the supreme court of the United States understood that under the New York decree the allowance might be forfeited and the decree annulled or recalled for the subsequent immoral conduct of the wife. The case of *Erkenbrach v. Erkenbrach*, 96 N. Y. 456, relied upon by respondent, was decided in 1884, and the point involved was whether ⁶⁵ the

plaintiff, who had obtained a decree in 1869 which had made no provision for her support, could ten years afterward, by petition in the same case, be then allowed alimony. The court held that she could not, and in deciding that proposition said: "The question presented by this appeal is whether a court has power, after the entry of a final decree in an action of limited divorce, establishing a cause of action in favor of the wife, to order an additional allowance for her support. . . . The question comes back to the interpretation of our own statute. No case has been cited in our courts where an application for an allowance for the support of the wife after final decree has been made, except in the case of *Kamp v. Kamp*, 59 N. Y. 219, where the allowance was refused. That was a case of absolute divorce, but no distinction is seen to exist between such a case and one of limited divorce. The statutes authorizing such an allowance in the final decree are similar in both cases, and the power of the court to make such order after final decree is given and prescribed in the same language by the same section. . . .

"By expressly authorizing an order to be made after judgment providing only for the 'care, custody, and education of the children of the marriage,' it has implicitly prohibited such an order for any other cause."

The allowance to the wife is in the nature of a debt due from one party to the other. The supreme court of Missouri has held that the statutory authority to alter a decree as to alimony or the custody of the children can only be exercised upon new facts occurring after the trial: *Deidesheimer v. Deidesheimer*, 74 Mo. App. 236. Unless such facts occur there can be no alteration of the decree. An ordinary judgment or decree in a suit at law or in equity may be discharged by payment, or new facts might arise after judgment warranting its discharge or modification by the court, and proceedings by petition in the same suit might be entertained by the ⁶⁶ court for that purpose. That would not affect the finality in the first instance. So, in the case at bar, facts might occur after the decree, such as indicated by Justice Daniel, which would authorize the court to recall the decree. The proceedings in the action to bring these facts to the attention of the court would be in the nature of a new suit. In this case the husband has removed from the jurisdiction of the Missouri court, probably carrying with him all his property, and, from what the record discloses, has taken no steps to modify the decree; and if his contention here is correct, he need take no such steps. By pursuing this course he prevents any payment of the judgment of

the Missouri court, no matter how able to respond he may be. "Final judgments," says Blackstone, "are such as at once put an end to the action, by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for": 3 Blackstone's Commentaries, 398. The plaintiff in this action, by her answer in the circuit court of the city of St. Louis in the case of Fred M. Spinning against her, put an end to that action, and recovered the remedy she sued for; and for the purpose of that action, so far as the issues then joined, the judgment was final, within Blackstone's definition. Facts might or might not subsequently arise which would destroy the effects of the judgment or modify it, but these would only furnish grounds for what we have seen would practically be a new suit.

To give effect, as required by section 1, article 4, of the constitution of the United States and the acts of Congress passed in pursuance thereof, to the judgment alleged in the complaint, we hold it to be final, and, in the language of the supreme court of the United States in *Barber v. Barber*, 21 How. 582, "as much a debt of record, until the decree has been recalled, as any other judgment for money is." Should any modification thereof be hereafter made in the "67 courts of Missouri, our courts, by proper proceedings instituted therein, will give effect to such modification, thereby carrying out the requirements of the federal constitution. If any modification was made before this action was instituted, it can be pleaded by way of a defense or counterclaim in this action. In the case of *Barber v. Barber*, 21 How. 582, it was also held that under a decree awarding alimony rendered in any state of the United States, the court having jurisdiction, will be carried into judgment in any other state, to have there the same binding force that it has in the state in which it was originally given, and that for such purpose both the equity courts of the United States and the same courts of the state have jurisdiction. In *Kunze v. Kunze*, 94 Wis. 54, 59 Am. St. Rep. 857, 68 N. W. 391, the supreme court of Wisconsin says: "If a divorce judgment decree the payment of a specific sum absolutely as alimony, and if (as alleged in this case) such a decree has the effect in that state of a judgment at law for the payment of money, there seems no reason why such a decree may not be enforced by action at law in another state."

The law of Missouri expressly enacts that, when alimony is decreed in gross, such decree shall be a general lien on the realty of the party against whom the decree may be rendered, as in the case of other judgments. For the reasons given herein,

we think the lower court erred in sustaining the demurrer to the amended complaint.

The second assignment of error is that the court erred in discharging the garnishee respondent, the National Bank of Commerce, from whom the respondent, Spinning, had rented a compartment and box in its safety deposit vaults.

Under our laws the writ of garnishment commands the garnishee to answer on oath, not only as to his indebtedness to the defendant, but also as to the personal property ⁶⁸ or effects of the defendant in possession of the garnishee, or under his control: Ballinger's Code, sec. 5393. From and after the service of the writ, it shall not be lawful for the garnishee to pay to the defendant any debt or to deliver to him any effects, and any such payment or delivery shall be void and of no effect as to so much of the debts and effects as may be necessary to satisfy the plaintiff's demand: Ballinger's Code, sec. 5398. Should it appear from the garnishee's answer or otherwise that the garnishee had in his possession, or under his control, property or effects of the defendant liable to execution, the court shall render a decree requiring the garnishee to deliver up to the sheriff on demand such personal property or effects, or so much of them as may be necessary to satisfy the plaintiff's claim: Ballinger's Code, sec. 5404.

The answer of the garnishee may be controverted by the plaintiff or defendant, and issue shall be formed and tried under the direction of the court: Ballinger's Code, secs. 5409-5411. When the writ is served the garnishee is to retain control of the effects of the debtor until the court shall order that part liable to execution turned over to the sheriff. The writ is in aid of the writ of execution. Under section 5404, supra, the court is required to ascertain whether the garnishee has under his control or not any effects of the defendant liable to execution, and the court shall thereupon render a decree requiring the garnishee to deliver such effects to the sheriff. The language of the statute is: "Should it appear from the garnishee's answer or otherwise that the garnishee has in his possession or under his control, or had when the writ was served any personal property or effects of the defendant liable to execution, the court shall render a decree requiring the garnishee to deliver up to the sheriff on demand such personal ⁶⁹ property or effects, or so much of them as may be necessary to satisfy the plaintiff's claim": Ballinger's Code, sec. 5404.

And this answer must be a true answer as to the several matters inquired of in the writ: Ballinger's Code, sec. 5399. This

means that there shall be a hearing by the court preliminary to such decree, and that the court shall ascertain from the answer or otherwise whether or not the garnishee has under his control effects of the debtor liable to execution. There was a trial in this case to ascertain these facts. The only question, however, inquired into by the court on the answer of the garnishee, was touching the manner in which the box was locked and the control of the garnishee over the box. The answer of the garnishee now here alleges that it did not have effects of the defendant under its control. In substance, it says it did not have such effects, unless they were in the box, and the answer then states the facts touching the control of the box. No evidence was introduced as to the contents of the box; it was simply as to the manner of control. From the conclusions of law, the findings of fact, the evidence, and the brief of the garnishee, it is evident that the only question considered by the court below and passed upon was whether the garnishee had control of the effects in the box. If we are correct in this, we are of the opinion that the court erred in holding that the garnishee did not have control of the contents of the box. At any time on the request of the defendant the garnishee could put it within the power of the defendant to remove the contents of the box, and the defendant could not remove the contents without the consent and active co-operation of the garnishee. As against the defendant, then, the garnishee had control of the contents of the box. It is true that it was impossible for the garnishee to answer specifically as to the contents of the box. The court, however, under section 5404, *supra*, ⁷⁰ is authorized to determine from the answer or otherwise the effects under the control of the garnishee liable to execution. Under the broad provisions of this section the court could inquire into the contents of the box by causing the defendant to be examined as a witness, and might even require an inspection of the contents, to the end that the effects liable to execution should be delivered to the sheriff. In the meantime, after the service of the writ, it would be the duty of the garnishee to retain exclusive control of the box until discharged by the court. Should the defendant desire to remove from the box articles not liable to execution, the court, under proper restrictions, could allow the same. From what we have said, it follows that the court erred in discharging the garnishee respondent, the National Bank of Commerce. The court also erred in discharging the other garnishees herein, resulting from its decision that the amended complaint did not state facts sufficient to constitute a cause of action. The court

also erred in sustaining the demurrer to said amended complaint, and in dismissing this action, and in awarding costs herein to respondent Spinning and the garnishee respondents.

In all the particulars herein enumerated the court below is reversed. This action is remanded to the court below, with instructions to proceed with the hearing of this case as in this opinion indicated. The appellant is also entitled to her costs on this appeal against the respondent, Spinning, and the respondent, the National Bank of Commerce.

Anders, Reavis, and Fullerton, JJ., concur.

Dunbar, J., not sitting.

IN A SUIT UPON A FOREIGN JUDGMENT, the jurisdiction of the court that rendered it need not be alleged: *Ferry v. Miltimore etc. Co.*, 71 Vt. 457, 76 Am. St. Rep. 787, 45 Atl. 1035. This principle is applied to a decree for alimony in *Kunze v. Kunze*, 94 Wis. 54, 59 Am. St. Rep. 857, 68 N. W. 391.

A JUDGMENT FOR ALIMONY is a debt of record: *Conrad v. Everich*, 50 Ohio St. 476, 40 Am. St. Rep. 679, 35 N. E. 58. It has extraterritorial value and force, and the courts of another state should give it full credit and effect: *Lynde v. Lynde*, 162 N. Y. 405, 76 Am. St. Rep. 332, 56 N. E. 979. See, further, *Kunze v. Kunze*, 94 Wis. 54, 59 Am. St. Rep. 857, 68 N. W. 391; *Arrington v. Arrington*, 127 N. C. 190, 80 Am. St. Rep. 791, 37 S. E. 212. However, it has been held that a foreign decree for the future payment of alimony, which remains subject to the discretion of the foreign court, lacks that conclusiveness of character requisite for its enforcement by the courts of another state: *Lynde v. Lynde*, 162 N. Y. 405, 76 Am. St. Rep. 332, 56 N. E. 979.

GRIFFITH v. HOLMAN.

[23 Wash. 347, 63 Pac. 239.]

A PUBLIC NUISANCE CAN BE ABATED ONLY BY A PUBLIC OFFICER, except where the party who desires to abate it has some special interest in the abatement which is different from, and greater than, the interest of the community.

WATERS—NAVIGABILITY—QUESTION OF FACT.—Excepting salt-water streams, the question as to the navigability of a stream is one of fact, to be established by those who seek to use it as such; and the stream must be navigable in its natural state, unaided by artificial means or devices.

WATERS—FRESH-WATER RIVER—WHEN NOT NAVIGABLE.—An unmeandered fresh-water river is a non-navigable stream, where it has during high water, for about three months of

the year, an average width of forty feet and depth of four feet, and for the rest of the year, and for about twenty years, has had an average width of forty feet and depth of two feet, the width and depth, however, varying at all seasons of the year, sometimes being more than forty feet wide and only six inches in depth, and which river has never been navigated, except by ordinary row-boats run up and down therein by persons desiring to fish for pleasure.

WATERS.—THE TITLE TO THE BED OF A NON-NAVIGABLE FRESH-WATER STREAM is in the adjacent riparian proprietors to the center of the stream; and one who owns both banks bordering on such a stream has title to the land in its bed, and may lawfully maintain a fence across it.

WATERS — NON-NAVIGABLE STREAMS — RIGHT OF FISHERY.—The owner of land, through which flows a non-navigable fresh-water stream, has an absolute, exclusive right of fishery therein, on his own land, which right must, however, be so exercised as not to injure the rights of others on the stream, above or below.

R. L. Edmiston, for the appellant.

A. E. Gallagher, for the respondents.

347 DUNBAR, C. J. This action is brought by the respondents to recover of appellant two hundred and fifty dollars as damages which the respondents **348** sustained by reason of the appellant cutting a wire fence on the land of respondents in Spokane county, where such wire crossed the stream known as the "Little Spokane river," which flows through the land of respondents; and also to recover of the appellant the sum of two hundred and fifty dollars, the value of certain trout fish which appellant caught in said Little Spokane river while in a boat on said river on respondents' land where said river runs across the land of respondents, and which said fish appellant took and converted to his own use. A demurrer interposed to the amended complaint was overruled. Defendant (appellant) refusing to plead further, the court made findings of fact and conclusions of law in accordance with the allegations of the amended complaint, and gave judgment in favor of plaintiffs (respondents) and against defendant for five hundred dollars and costs. The findings of fact following substantially the allegations of the complaint, it is necessary to examine only the allegations of the complaint, under the first assignment of error, that the court erred in overruling the demurrer of defendant to the amended complaint, although assignments of error are based upon the conclusions of law.

It is conceded by the appellant that only two propositions are involved, viz.: 1. Did the respondents have a legal right to

place on their land the barbed-wire fence in question across the stream, so as to prevent the passage of rowboats; and 2. Did the appellant have a right to catch fish in the stream on respondents' land, he being in a rowboat, as alleged in the amended complaint. The complaint alleges in the usual manner the trespass and the catching of the fish, the ownership of the land, and that said stream had never been meandered, and gives the following description of the stream:

349 "That said Little Spokane river, where the same runs through, over, and across the premises described, and for ten miles up said river from said premises, and down said river from said premises to the mouth of said Little Spokane river, during high water in said river, the water therein is of an average width of forty feet and on an average during said time of four feet in depth; that high water continues at various stages in height in said river for about three months during each year, and the water in said river at said premises and up and down said river from said premises for the distance above stated during the rest of each year for the last twenty years has been about forty feet in width and two feet in depth; that the depth and width of the water in said river for the distance above mentioned varies at different places in said river at all seasons of the year, the water in said river at places becoming wider than as above stated, and at places as low as six inches in depth; that said river, from a point about ten miles above the premises above described to its mouth, carries at all seasons of the year sufficient water in width and depth so as to permit the running of rowboats of the usual size up and down said river; that no part of said river has ever been used as a navigable stream or highway for any purpose whatever, except that said river has been used to a limited extent for the purpose of pleasure by the running of rowboats up and down said river by persons desiring to fish for pleasure in said river."

It alleges the maintenance by the plaintiffs of the barbed-wire fence above mentioned, the catching of the fish by the defendant without any authority, and the appropriation of the same to defendant's use.

It is contended by the appellant that the stream was a navigable stream and that, therefore, the defendant had a right to navigate the stream and to fish therein; and that the respondents had no right to put a fence of any kind across it which would interfere with the right of the public ³⁵⁰ to use it for all purposes for which nature made it applicable, citing in support of this contention section 7303 of Ballinger's Code, which is a

statute to prevent the obstruction of navigable waters in this state; and that, the fence being a public nuisance, the appellant had a right to abate it. But, even conceding for the purpose of the discussion, that the stream was a navigable one, the principle of law is well established that a public nuisance can be abated only by a public officer, except where the party who desires to abate it has some special interest in the abatement which is different from and greater than the interest of the community. The cases which the appellant cites from this court to sustain his contention are squarely opposed to him. Thus, in *Carl v. West Aberdeen Land etc. Co.*, 13 Wash. 616, 43 Pac. 890, the right to abate the nuisance was founded upon a special interest, the court in that case saying: "Under this assignment of error it is further contended that the obstruction was a public one, but, even if it was, the plaintiffs showed that they were so situated that they had a special private interest in having it removed so that they could pass their logs down the river, and for that reason were entitled to maintain their action for that purpose." Even this case was where there was an action to abate the nuisance, and not an attempt by the party to abate it himself.

The citation from *Gould on Waters*, section 42, does not seem to us to affect the question in any way. That special damages must be shown, see *Jones v. St. Paul etc. Ry. Co.*, 16 Wash. 25, 47 Pac. 226; *Stufflebeam v. Montgomery*, 2 Idaho, 763, 26 Pac. 125; *Esson v. Wattier*, 25 Or. 7, 34 Pac. 756; 2 *Wood on Nuisances*, 3d ed., sec. 646, and cases cited in note 4.

351 But we are of the opinion from the allegations of the complaint that the river was non-navigable. Hence it becomes necessary to ascertain the rights of riparian owners. The title to the land under all the navigable waters of this state passed from the sovereignty of the United States to the sovereignty of the state upon the admission of the state to the Union; but under the well-established law of the land, the title to the land under the non-navigable waters passes from the United States to the grantee of the upland bounding on such non-navigable waters as an incident to such grant; and, although at the common law the test of the navigability is the ebb and flow of the tide, yet, especially in this country, it is held that the rivers and streams above the ebb and flow of the tide, which have sufficient capacity for useful navigation, are public rivers and subject to the same general rights which the public possesses in navigable waters. But we are clearly of the opinion that the stream under consideration is a non-navigable stream. Many of the authorities which we will cite in support of this contention

support also the other propositions indicated above, and they will, therefore, be cited indiscriminately.

"A stream is a public highway wherever it is suitable in its natural condition for general use in travel or in the transportation of property": Gould on Waters, sec. 107.

"If the stream is not always navigable it must be capable of floatage, as the result of natural causes, at periods ordinarily recurring from year to year, and continuing for a sufficient length of time in each year to make it useful as a highway. The mere possibility of occasional use during brief or extraordinary freshets does not give it a public character. A similar principle applies in the case of small tidal creeks, in which, although prima facie they are public and navigable, private property may be maintained. It is not every small creek in which a fishing skiff or gunning canoe can be made to float at high tide which ³⁵² is deemed subject to public use; but in order to have a public character, it must be navigable for some purpose useful to business or pleasure": Gould on Waters, sec. 109.

"But, while the common law only regarded those streams in which the tide ebbed and flowed to the extent of such flow and reflow as navigable, yet there was another class of streams called fresh-water streams, which, if susceptible of navigation by 'boats and lighters,' or, as it would seem, for any beneficial public purpose, and were navigable in fact, were regarded as highways over which the public had free access, for the purposes of trade and commerce. The only real distinction between the two classes of streams arose from the distinction as to the ownership of the alveus of the stream, and the rights of riparian owners therein. In all salt-water streams, subject to the action of the tides, the king not only owned the alveus, but had exclusive title in, and jurisdiction over, the stream for all purposes not inconsistent with navigation, while in fresh-water streams, the riparian owner had certain special privileges of which the king could not deprive him. He had the exclusive right of fishery, the benefit of alluvial deposits or accretion, the right to erect wharves which did not impede navigation and to take tolls for the use of them, and, in fact, a right to make any use of the water or the bed of the stream that his tastes or interests dictated, that did not interfere with the public right of passage. Therefore, when it is said that by the common law no stream is regarded as navigable except those in which the tide ebbs and flows, it is not meant that no other streams are burdened with a public easement of passage, but that in law, and irrespective of the question of fact, all such streams are navigable, whether they are so in fact

or not, and that the title thereto, with all privileges, vests in the king; and that all other streams, navigable in fact, are highways for the passage of boats, but the title to which, with all special privileges, outside of the public easement, vests in the owner of the banks": 1 Wood on Nuisances, 3d ed., sec. 452.

353 So that it would seem in this case that, even conceding that the stream, which is a fresh-water stream, be a navigable or public river, yet the right of fishing remained in the owner of the banks, the public having only an easement over the land, and the taking of the fish therefrom would be a trespass for which the owner would be entitled to damages. It is true the fact that a stream is not meandered does not establish the fact that it is a non-navigable stream, but probably indicates that, in the minds of the officers ordering the survey, it was not a navigable stream. It is well established that, except in salt-water streams, the question of navigability is one of fact that must be established by those who seek to use it as such; and it is also well established that the stream must be navigable in its natural state, unaided by artificial means or devices. This proposition was announced by this court in *East Hoquiam Boom etc. Co. v. Neeson*, 20 Wash. 142, 54 Pac. 1001, where it was said: "It is well settled that a stream which can only be made navigable or floatable by artificial means is not a public highway," citing many cases to sustain the proposition. In *Rowe v. Granite Bridge Corp.*, 21 Pick. 344, Chief Justice Shaw, delivering the opinion of the court, said: "Nor is it every small creek, in which a fishing skiff or gunning canoe can be made to float, at high water, which is deemed navigable. But, in order to have this character, it must be navigable for some purpose useful to trade or agriculture."

In *Nutter v. Gallagher*, 19 Or. 375, 24 Pac. 250, a case which is cited by appellant, it is held that a stream or watercourse, in order to be navigable, must be of sufficient extent and capacity to enable the community at large to utilize it in the navigation of boats and other watercraft thereon, for the transportation of products **354** and other merchandise, or for the purpose of floating logs and timber from forests to market. In the case of *The Montello*, 20 Wall. 430, where the language of Chief Justice Shaw, *supra*, was repeated and indorsed, it was said that: "The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use." It was held in *Haines v. Hall*, 17 Or. 165, 20 Pac.

831, that a stream which has a floatable capacity at certain periods, recurring with regularity and continuing for a sufficient length of time to make it useful as a highway for floating logs, is navigable; but to be navigable in this sense it must be capable of such floatage as is of practical utility and benefit to the public as a highway for trade and commerce. It was further said: "If its location is such, and its length and capacity so limited, that it will only accommodate a few persons, it cannot be considered a navigable stream for any purpose. It must be so situated, and have such length and capacity, as will enable it to accommodate the public generally as a means of transportation." To the same effect is *Burroughs v. Whitwam*, 59 Mich. 279, 26 N. W. 491.

The court, in *Wethersfield v. Humphrey*, 20 Conn. 218, in passing upon the question of whether certain waters were navigable, after reciting the fact that at times a fishboat, or skiff, or Indian canoe might have been pushed through the waters, said: "But this is not navigation. That only is such, and those only are navigable waters, where the public pass and repass upon them, with vessels or boats, in the prosecution of useful occupations. There must be some commerce or navigation which is essentially valuable"—³⁵⁵ citing Lord Hale's remarks in his treatise *De Jure Maris*: "There be some streams or rivers that are private, not only in property and ownership, but also in use, as little streams and rivers that are not a common passage for the king's property."

To the same effect is *American River Water Co. v. Amsden*, 6 Cal. 443. In that case it was held: "A river beyond the ebb and flow of the tide may be navigable, when it has sufficient depth and width to float a vessel used in the transportation of freight or passengers; and this has been extended to its capacity to float rafts of lumber. To go beyond this and declare a stream navigable which can float a log would be to turn a rule intended for the benefit of the public into an instrument of serious detriment to individuals, if not of actual private oppression."

"It should be understood that, except in salt-water streams, so far as the tide ebbs and flows, the question of navigability is one of fact, and must be established by those who seek to use it as such; and, also, that the stream must be navigable in its natural state, unaided by artificial means or devices. If a stream is not susceptible of valuable use to the public as a navigable or

floatable stream, without the erection of dams, it is not a navigable stream, even though it might be applied to that use after dams are erected": 1 Wood on Nuisances, 3d ed., sec. 463.

There is no claim here that the stream, under discussion was ever used as a floatable stream, or that any transportation has been carried on over it except in small boats, from which persons fished for pleasure.

The legislature of this state has provided that the common law, so far as it is not inconsistent with the laws of the United States, or of the state of Washington, or incompatible with the institutions and condition of society of this state, shall be the rule of decision in all the courts of this state: Ballinger's Code, sec. 4783. The common-law rule ³⁵⁶ having been adopted, it must be held that the title to the beds of non-navigable streams is in the adjacent riparian proprietors to the center of the stream. This holding is not inconsistent nor incompatible with the institutions and condition of society in this state, nor with the constitution and laws of the United States or of the state of Washington. It was held by this court in *Benton v. Johncox*, 17 Wash. 277, 49 Pac. 495, 61 Am. St. Rep. 912, that the common-law doctrine declaratory of riparian rights is not inconsistent with the constitution and laws of the United States or of this state, or incompatible with the conditions of society in this state, "unless," said the court, "it can be said that the right of an individual to use and enjoy his own property is incompatible with our condition." The statute law and the decisions of this court, then, having made the common law the arbiter of the rights of the riparian proprietors, the decisions of the courts declaring the rights of riparian proprietors under the common law become important. In *Hooker v. Cummings*, 20 Johns. 90, 11 Am. Dec. 249, it was said: "In the case of *People v. Platt*, 17 Johns. 195, 8 Am. Dec. 382, . . . we recognized the principles of the common law to be, that in case of a private river—that is, where it is a fresh-water river, in which the tide does not ebb and flow, and is not, therefore, an arm of the sea—he who owns the soil has, *prima facie*, the right of fishing; and if the soil on both sides be owned by an individual, he has the sole and exclusive right": See, also, *Palmer v. Mulligan*, 3 Caines, 308, 2 Am. Dec. 270.

In *Adams v. Pease*, 2 Conn. 481, it was held that: "The owners of land adjoining Connecticut river above the flowing and ebbing of the tide have an exclusive right of fishery, opposite to their land, to the middle ³⁵⁷ of the river; and the public

have an easement in the river, as a highway, for passing and re-passing with any kind of watercraft."

"The bed and banks of a fresh-water river, where the tide does not ebb and flow, are the property of the riparian proprietors, the public having an easement only for passage as on a public highway; and such proprietors may use the land or water of the river in any way not inconsistent with this easement": (Syllabus) *Chenango Bridge Co. v. Paige*, 83 N. Y. 178, 38 Am. Rep. 407.

In *Attorney General v. Evart Booming Co.*, 34 Mich. 462, among other things, it was said in substance by Judge Cooley, who rendered the decision of the court, that the Muskegon river was not a navigable stream, and the public had no rights whatever in the soil under it; that it was only a small stream, whose value to the public consisted in the use that could be made of it for the purpose of floating logs and lumber; and it was held that the property taken in such a case was private property, and the owner of the bank could maintain trespass or ejectment against the taker: See *June v. Purcell*, 36 Ohio St. 396.

In *McFarlin v. Essex Co.*, 10 Cush. 304, it was said by Chief Justice Shaw, speaking for the supreme court of Massachusetts, that it was well established as law of the commonwealth that in all waters not navigable in the common-law sense of the term, the right of fishery is in the owner of the soil upon which it is carried on, and in such rivers that the right of the soil is in the owner of the land bounding upon it: Citing *Waters v. Lilley*, 4 Pick. 145, 16 Am. Dec. 333, and *Commonwealth v. Chapin*, 5 Pick. 199, 16 Am. Dec. 386.

In *Lincoln v. Davis*, 53 Mich. 375, 51 Am. Rep. 116, 19 N. W. 103, it was held by the supreme court of Michigan that the law was well settled that riparian ³⁵⁸ proprietors upon fresh-water streams had the exclusive right of fishing in the water opposite their land: Citing *Gould on Waters*, sec. 182, and cases cited in note 1; *Angell on Watercourses*, sec. 61; *Hart v. Hill*, 1 Whart. 123; *Beckman v. Kreamer*, 43 Ill. 447, 92 Am. Dec. 146. The citation from *Gould on Waters*, section 182, is as follows: "Riparian proprietors upon the fresh-water streams have the exclusive right of fishing in the water opposite their lands, and this right extends to navigable fresh rivers as well as those which are unnavigable, where the soil of the former is held to be private property. Riparian proprietors upon all such streams, whose title extends *ad filum aquæ*, can maintain an action of trespass against those who draw a seine between the center of the stream and the bank of his land."

It is true that the legislature of the state has passed laws regulating fishing, has made close seasons, and provided a penalty for persons killing fish by use of dynamite or other explosives. It is also true that fish are *feræ naturæ*, and that their habitat is not entirely local; hence it might be thought that no property in fish could vest in the owner of the land; but it is ownership subject to the rights of the public, and must be exercised with due consideration for the nature of the property, and exercised only when the fish are upon the land of the owner. In accordance with this view, it was held in *State v. Roberts*, 59 N. H. 256, 47 Am. Rep. 199, that, while the right of fishery in waters not navigable was limited to the riparian owner of the soil, and belonged exclusively to him, yet this right in the owner of the land must be regarded as qualified to a certain extent by the universal principle that all property is held subject to those general regulations which are necessary to the common good and general welfare, and to that extent it was subject to legislative control; that it is a well-established principle ³⁵⁹ that every person shall so use and enjoy his own property, however absolute and unqualified his title, that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the public. Hence, while the riparian owner has the exclusive right of fishery upon his own land, he must so exercise that right as not to injure others in the enjoyment of a right upon their lands upon the stream above and below. But, subject to these qualifications, the right of fishery to the riparian owner is absolute. To the same effect are *Beach v. Morgan*, 67 N. H. 529, 68 Am. St. Rep. 692, 41 Atl. 349; *Trustees etc. v. Strong*, 60 N. Y. 56; *Holyoke Co. v. Lyman*, 15 Wall. 500; *Sterling v. Jackson*, 69 Mich. 488, 13 Am. St. Rep. 405, 37 N. W. 845; *Washington Ice Co. v. Shortall*, 101 Ill. 46, 40 Am. Rep. 196; *Braxon v. Bressler*, 64 Ill. 488; *Cobb v. Davenport*, 33 N. J. L. 223, 97 Am. Dec. 718; *New England Trout etc. Club v. Mather*, 68 Vt. 338, 35 Atl. 323; *Norcross v. Griffiths*, 65 Wis. 599, 56 Am. Rep. 642, 27 N. W. 606.

It appearing from the record in the case that the river from which these fish were taken was non-navigable, that the owners had a right to maintain a fence over the same, and that they had the exclusive right of fishery in the waters flowing over the land, and no proper exceptions having been taken to the finding in relation to the amount of damages, the judgment will be affirmed.

Anders and Fullerton, JJ., concur.

Reavis, J., concurs in the result.

THE RIGHT TO FISH IN AN UNNAVIGABLE STREAM is limited exclusively to the riparian owner or his tenant, where the stream flows through his land, unless another shows a right acquired in some way recognized by law: *Beach v. Morgan*, 67 N. H. 529, 68 Am. St. Rep. 692, 41 Atl. 349. See, further, on the right of fishing, *Albright v. Cortright*, 64 N. J. L. 330, 81 Am. St. Rep. 504, 45 Atl. 634.

THE QUESTION OF THE NAVIGABILITY OF A STREAM is one of fact, to be determined by the jury: *Railroad v. Ferguson*, 105 Tenn. 552, 80 Am. St. Rep. 908, 59 S. W. 343.

THE TITLE OF A RIPARIAN OWNER OF LAND extends to the middle of a non-navigable stream: *Welles v. Bailey*, 55 Conn. 292, 3 Am. St. Rep. 48, 10 Atl. 565. It seems to be otherwise in the case of meandered lakes: *Hammond v. Shepard*, 186 Ill. 235, 78 Am. St. Rep. 274, 57 N. E. 867. See, further, on waters as boundaries, the monographic note to *Allen v. Weber*, 27 Am. St. Rep. 56-63.

NUISANCE.—A PRIVATE ACTION FOR A PUBLIC NUISANCE can be maintained by one who suffers therefrom some particular loss or damage beyond that suffered by him in common with others. But interference with a common right does not of itself afford a cause of action by an individual: *Knowles v. Pennsylvania R. R. Co.*, 175 Pa. St. 623, 52 Am. St. Rep. 860, 34 Atl. 974.

NEUFELDER v. THIRD STREET AND SUBURBAN RY. [23 Wash. 470, 63 Pac. 197.]

FIXTURES — MACHINERY AND ENGINES.—AS BETWEEN A MORTGAGOR AND A MORTGAGEE of real property, machinery and engines attached to a building thereon, by means of lag-screws and bolts, are personal property, which may be removed by the mortgagor, where no intent appears to have had them become a part of the realty, and it does appear that they are not specially designed for the building, but of common lot and description, bought and sold in the markets according to price list and sample; that they are capable of removal without material injury to the premises; and that the building can again be equipped with machinery and engines, suitable for its purposes, without alteration of the structure.

Morris B. Sachs, John P. Hoyt, and Pierre P. Ferry, for the appellant.

Bausman, Kelleher & Emory, for the respondent.

470 FULLERTON, J. In 1884 the Western Mill Company, being then the owner of certain real property, mortgaged the same to Myer Lewis to secure a loan made to it on that day by Lewis. The mortgage was in the usual form of a real estate mortgage, and the description of the property was ample to cover everything on the mortgaged premises that could properly be said to be a part of the realty, but contained nothing from which it could be inferred that it was intended to cover the personal property then on the premises, or which might thereafter be put thereon by the mortgagor. At the time of the execution of the mortgage there was a sawmill on the land having a capacity of about **471** forty-five thousand feet of lumber per day. In 1888 and 1889 the mortgagor erected a new sawmill building thereon, and fitted it out with machinery in part taken from the old mill and in part newly purchased, giving the new mill a capacity of about one hundred thousand feet of lumber per day. The old building was turned into a planing-mill and sash and door factory, and was fitted out with the usual machinery used in conducting a business of that character. Subsequent to that time the property was sold and conveyed to the respondent herein. The mortgage was not paid, and in 1895 a suit to foreclose the same was duly commenced by the then owner of the mortgage. While this foreclosure proceeding was pending, respondent removed from the premises certain of the machinery used in the sawmill and sash and door factory. Subsequent thereto the real property was sold under a decree of foreclosure of the mortgage, and purchased by the mortgagee at a sum less than the amount the court found to be due upon the mortgage debt. This is an action brought by the successor in interest of the mortgagee to recover damages alleged to have been suffered because of the removal of the property, the contention being that the property removed was a part of the realty. The trial court found the following facts:

"I find that all the machinery in the planing-mill and sash and door factory removed by the defendant herein as aforesaid was attached to the building by lag screws for the purpose of steadying it while in use. That all of this machinery was capable of being moved from the premises without material injury thereto, and that it was in fact removed by the defendant without material injury thereto. I find that all the machinery in the planing-mill and sash and door factory, removed as aforesaid by the defendant, was machinery of common sort and description; that it was machinery of a sort bought and sold by price list and sample, according to cata-

logues, ⁴⁷² and that it was not specially made or designed for that building or those premises; that it can be used as well in any other premises of like nature, and that like machinery can be purchased and put in use upon these premises for the purposes of a planing-mill and sash and door factory without alteration of the premises.

"As to block 'A' (the sawmill property), I find that with the exception of one engine, hereinafter referred to, all the machinery and apparatus in the sawmill thereon, removed as aforesaid by defendant, was machinery of common lot and description, bought and sold in the markets according to price list and sample and found in catalogues; that it was not more specially adapted to that structure than to any other milling structure; that it can be used in any other mill as well as in that; that when the mill itself was built some of this machinery was contemplated, but that it was built substantially in the manner of any other sawmill, and that it can again be equipped with machinery suitable for its purposes without alteration of the structure.

"I find also that all the machinery on block 'A' so removed was never intended to become a part of the premises; that it was attached to the mill structure only for the purpose of steadying it while in use; that it could be removed from the premises without any material damage or alteration thereof.

"The machinery in the mill removed by the defendant was in some cases fastened to the floor by screws or lag bolts; in other cases the machinery was fastened to the frame of the building by the use of bolts of various lengths, averaging in size from a half inch in diameter to an inch and one-quarter in diameter. The engines in some instances were placed upon a foundation of timbers of several thicknesses or layers. These timbers were bolted to the framework of the mill, in some cases, and were held together with iron bolts, extending into or through them, so as to hold them solidly in place. The engines were bolted to this foundation of timbers. In most, if not all, cases the engine could be removed by unscrewing the nuts and lifting it off the bolts."

⁴⁷³ As a conclusion of law therefrom the court found that the property taken (with the exception of the engine mentioned) was personal property, and entered a judgment denying the right of appellant to recover therefor.

The appellant contends that the property removed was attached to the realty in such a manner as to make it, especially as between a mortgagor and mortgagee, a part thereof, and has

brought to our attention many cases, some of which, at least, fully support his contention. This question, however, is no longer an open one in this state. This court has by repeated decisions established the law that property of this character, attached as this was to the realty, is not a part thereof, but is personal property, and may be removed therefrom by its owner without incurring liability to any person who may have a lien on such real property. In *Cherry v. Arthur*, 5 Wash. 787, 32 Pac. 744, the question was whether a planer used in a saw-mill, which was bolted to the floor in such a way as to keep it from moving from its place when being used, was a part of the realty or was personal property. In that case the court said: "In ascertaining whether such a machine does become a part of the realty in favor of mortgagees, the rule is, that the manner, purpose, and effect of annexation to the freehold must be regarded. If a building be erected for a definite purpose, or to enhance its value for occupation, whatever is built into it to further those objects becomes a part of it, even though there be no permanent fastening such as would cause permanent injury if removed. But mere furniture, although some fastening be necessary to its advantageous use, is removable. Peculiarly subject to this rule are machines which can be used in one place as well as another, and which add nothing to the building, though they may be of advantage to the business conducted there."

⁴⁷⁴ In *Chase v. Tacoma Box Co.*, 11 Wash. 377, 39 Pac. 639, the question was whether the machinery of a box factory attached to the land in substantially the same manner as the property in this case was attached was a part of the realty. After an extended review of the decisions of courts of other states, as well as the case of *Cherry v. Arthur*, 5 Wash. 787, 32 Pac. 744, it was held that the machinery, notwithstanding the manner in which it was affixed to the realty, still retained its character of personalty. In the course of the opinion the court, after quoting from *Cherry v. Arthur*, 5 Wash. 787, 32 Pac. 744, the paragraph set out, said: "We are entirely satisfied with what is here said upon the subject, and think it best accords with reason and modern authority."

In *Washington Nat. Bank v. Smith*, 15 Wash. 160, 45 Pac. 736, the machinery in question was, as the record shows, "a planer and matcher, a surfacer and sizer, a gang edger, and a double block shingle machine." The machines were fastened to the floor of the mill in which they were then being used by means of lag screws and bolts running through the feet of the

machines into the floor and timbers of the mill upon which they rested. The contest was one between mortgagor and mortgagee, and one of the questions was whether the machines formed a part of the realty or were personal property. Passing on that question, the court said:

"No general rule can be promulgated under which it can be determined whether a particular piece of machinery is or is not a fixture to the real estate with which it is used. So many considerations enter into the determination of this question that no general rule can be stated which will apply in all cases. Not only can no general rule be adduced from the decisions of the courts which will apply to all cases, but it will appear from an examination of the decisions upon this question that there is ⁴⁷⁵ a great want of harmony even where the circumstances were identical. There is a class of cases which have adopted a rule which, if applied to the facts shown by the evidence to have existed as to the placing of this machinery in the mill building in which it was used, would require us to hold that such machinery was a fixture and passed to the mortgagee as a part of the real estate.

"A leading case of this kind is *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719. But the learned court which decided it, though apparently well satisfied with the conclusion to which it had come, was forced to admit that a contrary doctrine had been established by the courts of a majority of the states which had passed upon the question. This machinery was attached to the building in substantially the same manner as was that in controversy in the case of *Chase v. Tacoma Box Co.*, 11 Wash. 377, 39 Pac. 639, and *Cherry v. Arthur*, 5 Wash. 787, 32 Pac. 744, and under the rule announced in those cases, which rule we believe to be supported by the weight of authority, it must be held to have been personal property, and not such a fixture as to pass to the mortgagee."

This case also answers the argument of the appellant to the effect that a different rule applies where the controversy is between a mortgagor and mortgagee than is applicable where the controversy is between the mortgagee and one claiming adversely to the mortgagor. On this question it was said: "If the question as to the nature of this property had arisen between the mortgagee named in said chattel mortgage and the appellant, there could be no doubt but that under the rule heretofore announced by this court it would be held to be personal property, and in our opinion the rule was not changed by the

fact that the question was raised between the parties to the real estate mortgage."

Further, on the question what will in this state be considered personal property, see *German Sav. etc. Soc. v. Weber*, 16 Wash. 95, 47 Pac. 224; *476 Philadelphia Mtg. etc. Co. v. Miller*, 20 Wash. 607, 56 Pac. 382, 72 Am. St. Rep. 138.

Concluding, as we do, that the case at bar falls within the rule of these cases, it is unnecessary to discuss the other questions suggested.

The judgment is affirmed.

Dunbar, C. J., and Reavis and Anders, JJ., concur.

FIXTURE.—TO DETERMINE WHETHER A THING IS A FIXTURE, we must look at the character of the act by which it is put into place, the manner in which it is annexed, the intention of the parties, and the purpose for which the premises are used: *Atchison etc. R. R. Co. v. Morgan*, 42 Kan. 23, 16 Am. St. Rep. 471, 21 Pac. 809; *Lavenson v. Standard Soap Co.*, 80 Cal. 245, 13 Am. St. Rep. 147, 22 Pac. 184. The intention of the parties is a controlling consideration: *Edwards etc. Co. v. Rank*, 57 Neb. 323, 73 Am. St. Rep. 514, 77 N. W. 765. Physical annexation alone does not make a chattel a fixture: *Atchison etc. R. R. Co. v. Morgan*, 42 Kan. 23, 16 Am. St. Rep. 471, 21 Pac. 809. Recent cases on the question of fixtures are *Hall v. Law Guarantee etc. Co.*, 22 Wash. 305, 79 Am. St. Rep. 935, 60 Pac. 643; *Gunderson v. Swarthout*, 104 Wis. 186, 76 Am. St. Rep. 860, 80 N. W. 465; *Broadbuss v. Smith*, 121 Ala. 335, 77 Am. St. Rep. 61, 26 South. 34.

STATE v. PULLMAN.

[23 Wash. 583, 63 Pac. 265.]

MUNICIPAL CORPORATIONS—CONTRACTS.—THE PLEA OF ULTRA VIRES may be interposed by a municipal corporation, in an action against it upon a contract which it had no power to make.

MUNICIPAL CORPORATIONS—ULTRA VIRES CONTRACT.—When a town is prohibited by statute to contract for an extension of its water system, whereby an indebtedness is created, without the assent of three-fifths of its voters, and the statute requires public works, where the expenditure exceeds the sum of one hundred dollars, to be done by contract, and let to the lowest responsible bidder, the town has no authority, without the assent of its voters, to enter into a contract to purchase water pipe laid outside of the town limits, at a price in excess of two thousand dollars, and to supply water to any person or corporation beyond the limits of the town. Such a contract is *ultra vires*.

MUNICIPAL CORPORATIONS—ULTRA VIRES—ESTOPPEL.—The fact that a municipal corporation has received the benefit of a contract made by it, which is absolutely ultra vires, does not estop it from denying the validity of the contract.

MUNICIPAL CORPORATIONS—ILLEGAL CONTRACTS—RATIFICATION.—A contract of a municipal corporation, which is illegal for want of authority to make it, cannot be ratified.

P. H. Winston, attorney general, T. M. Vance, and Alex M. Winston, for the state.

V. E. Bull, for the respondent.

584 DUNBAR, C. J. This action was brought to recover the sum of two thousand one hundred and seventy-one dollars and thirty-six cents, for damages alleged to have been sustained by plaintiff, the state of Washington, by reason of the failure of the defendant, the city of Pullman, to purchase certain pipe in accordance with the contract set up in the amended complaint. The regents of the Agricultural College, Experiment Station, and School of Sciences of the state of Washington entered into a contract with the city of Pullman, through its mayor, that the college or the state would construct a reservoir on a point of land in the rear of the college, of two hundred and fifty thousand gallons capacity, lay a six-inch main therefrom to connect with the town pump of the city of Pullman, give to the town the use of said reservoir and pipe, and also give to the town the right to buy the said main at actual cost of laying the same, a certain monthly stipend for pumping the water for the use of the college, and a certain number of cents per gallon for water used for irrigation. At the end of the term for which the contract ran, the city refused to buy the plant, and this action was brought by the state to recover the value thereof, which was alleged to be two thousand one hundred and seventy-one dollars and thirty-six cents. Demurrer was interposed, which was overruled, and the city answered, pleading want of consideration, that the contract was ultra vires, and other defenses. With the view we take of the question of whether or not the city exceeded its power in entering into this contract, it will not be necessary to enter into a discussion of the question of whether the regents had a right to bind the state or bring this action in its behalf.

The contract is too long to set forth at length in this opinion, but, in substance, it was a promise on the part of the city to supply the college with water at a specified rate and a promise to buy from the state a portion of the water 585 system or

pipe lines from the west line of the state lands to connect with the town water system, to enable the town to supply water to persons without the limits of the town. Section 683 of 1 Hill's Code provides that in the erection, improvement, and repair of all public buildings, works, etc., when the expenditure required for the same exceeds the sum of one hundred dollars, the same shall be done by contract, and shall be let to the lowest responsible bidder, after due notice, under such regulations as may be prescribed by ordinance. If this transaction was simply a commercial transaction, it was beyond the power of the city authorities to enter into the contract, under the provisions of the section just quoted. There was no power in the regents of the college, as agents of the state, to make a contract to erect a water system and sell it to the town. Neither did the town of Pullman have any authority to enter into a contract to supply water to any person or corporation beyond its limits, or to construct a water system for the benefit of any other person than itself or its inhabitants. Under the provisions of sections 696 and 697 of 1 Hill's Code, the law which was in force at the date of the contract, the town was prohibited from contracting for the extension of its water system without the approval of its citizens and where the extension or addition created an indebtedness—and in this case an indebtedness was contracted for—it required the assent of three-fifths of the voters of the town. So that there can be no question but that the action of the town authority in entering into this contract was beyond the powers given it by law. In such case it is well settled that the plea of *ultra vires* may be interposed. In the discussion of this question, the distinction which is made between the application of the law to private corporations and its application to municipal corporations must be kept in mind, and this will eliminate from the ⁵⁸⁶ discussion the most of the authorities cited by the appellant. This distinction is wisely maintained, for the authority of a private agent is known only to the agent and the principal, but the authority of the officers of a municipal corporation is a matter of public record, which is available to everyone. The scope of their authority is embraced either in their charters or in the statutes of the state, and the limitation upon their powers is equally available to everyone who desires to deal with them. Hence, if one, knowing their powers and limitations, sees fit to enter into illegal contracts, contracts which the law has forbidden for the protection of the taxpayers of the municipality, he has no right to complain when he is estopped from enforcing his

illegal contract by a plea of ultra vires by the citizens of a municipality. If he knew the law and contracted in the face of that knowledge, he certainly ought not to recover; if he did not know the law as matter of fact, he is subject to no greater hardship than has always been imposed upon the citizen, viz., the denial of the right to plead ignorance of the law on the theory that it was his duty to know it.

It is claimed, however, by the appellant, that, having received the benefits of the contract which the city entered into, it ought to be estopped from denying its validity; also that it had ratified the contract by receiving the benefits. It is well established that the power to ratify is coextensive only with the power to contract, and that an act which was illegal for want of authority on the part of the contracting powers cannot be ratified. There has been a conflict of opinion on some branches of this question, but an investigation of the authorities will show, we think, that where courts have estopped municipalities from interposing the plea of ultra vires, and from escaping the responsibility of their acts, it has been where there has ⁵⁸⁷ been a defect in the execution of the contracts, as in the issuance of bonds, etc., and not where there has been an absolute want of power on the part of the municipality to contract. The most of the cases cited by the appellant, as we indicated before, were cases of private corporations. The appellant cites *Hitchcock v. Galveston*, 96 U. S. 341, in support of its contention. This is a case which falls within the rule announced above, and the city was proceeding within its powers, but in an irregular manner. In speaking of the claim that the city had exceeded its power, the supreme court of the United States in its opinion says: "Another objection to the validity of the contract, urged by the city, is founded upon a provision of the charter, that the council shall not borrow for general purposes more than fifty thousand dollars; and it is said the contract, if valid, creates a liability of the city exceeding that sum. This, however, does not appear in the contract itself, and this, perhaps, is a sufficient answer to the objection. But the limitation is upon the power to borrow money, and to borrow it for general purposes. It implies that there may be lawful purposes which are not general in the sense in which that word is used in the charter. An examination of the whole instrument, and of the numerous and large powers conferred upon the council, as well as duties imposed, makes it evident that the provision could not have been intended to prohibit incurring an indebtedness exceeding the sum named. It is in no sense a limitation of the debt of the city."

There are some remarks in this opinion that give color to the contention of the appellant; but that the supreme court of the United States did not intend to lay down the rule that, when a city exceeded its powers in a contract made by the authorities, the plea of *ultra vires* could not be successfully interposed, is made evident by a subsequent case from the same court, viz., *Salt Lake City v. Hollister*, ⁵⁸⁸ 118 U. S. 256, 6 Sup. Ct. Rep. 1055, wherein is pointed out the distinction between actions arising on contracts made by a corporation in excess of its corporate powers and actions against corporations for injuries caused by tortious acts done by its agents in the course of its business and of their employment in excess of its powers. In that case it was held that the city could not escape taxes due on its property, whether acquired legally or illegally, and could not make its want of legal authority to engage in a particular transaction or business a shelter from the taxation imposed by the government on such business. And, in answer to the contention of appellant in that respect, the court said: "It remains to be observed, that the question of the liability of corporations on contracts which the law does not authorize them to make, and which are wholly beyond the scope of their powers, is governed by a different principle. Here the party dealing with the corporation is under no obligation to enter into the contract. No force, or restraint, or fraud is practiced on him. The powers of these corporations are matters of public law open to his examination, and he may and must judge for himself as to the power of the corporation to bind itself by the proposed agreement. It is to this class of cases that most of the authorities cited by appellants belong—cases where corporations have been sued on contracts which they have successfully resisted, because they were *ultra vires*."

It is true that the court, continuing, says: "But even in this class of cases the courts have gone a long way to enable parties who had parted with property or money on the faith of such contracts, to obtain justice by recovery of the property or the money specifically, or as money had and received to plaintiff's use": Citing *Thomas v. Railroad Co.*, 101 U. S. 71; *Louisiana v. Wood*, 102 U. S. 294; *Chapman v. Douglas County*, 107 U. S. 348, 2 Sup. Ct. Rep. 62. ⁵⁸⁹ But an examination of those cases shows that the general rule announced by the court above had not been impinged upon.

The law is announced by Mr. Dillon, in his work on *Municipal Corporations*, fourth edition, section 457, in a manner so concise and explicit that we cannot do better than to give

it room in this opinion. It is as follows: "The general principle of law is settled beyond controversy that the agents, officers, or even city council of a municipal corporation, cannot bind the corporation by any contract which is beyond the scope of its powers, or entirely foreign to the purposes of the corporation, or which (not being legislatively authorized) is against public policy. This doctrine grows out of the nature of such institutions, and rests upon reasonable and solid grounds. The inhabitants are the corporators; the officers are but the public agents of the corporation. The duties and powers of the officers or public agents of the corporation are prescribed by statute or charter, which all persons not only may know, but are bound to know. The opposite doctrine would be fraught with such danger and accompanied with such abuse that it would soon end in the ruin of municipalities, or be legislatively overthrown. These considerations vindicate both the reasonableness and necessity of the rule that the corporation is bound only when its agents or officers, by whom it can alone act, if it acts at all, keep within the limits of the chartered authority of the corporation. The history of the workings of municipal bodies has demonstrated the salutary nature of this principle, and that it is the part of true wisdom to keep the corporate wings clipped down to the lawful standard. It results from this doctrine that contracts not authorized by the charter or by other legislative act—that is, not within the scope of the powers of the corporation under any circumstances—are void, and in actions thereon the corporation may successfully interpose the plea of *ultra vires*, setting up as a defense its own want of power under its charter or constituent statute to enter into the contract," citing authorities too numerous to reproduce.

590 And if anything were wanting to elucidate the wisdom of the text announced, or to show the pernicious results of tolerating the practice indulged in by municipal authorities to exceed their legal powers, the history of the cities of the Pacific coast furnishes the instance, where, under the stimulus of rivalry in the growth of cities, obligations had been incurred which have bankrupted cities and impoverished the inhabitants by excessive taxation rendered necessary to meet such obligations.

In *Brady v. New York*, 16 How. Pr. 432, it was held that, where the contract under which work was done was void because entered into in violation of the charter, the contractor could not recover for the work in any form, neither under the contract nor as upon a quantum meruit, and that the subsequent

ratification of the contract by the common council, whether before or after the work was done, did not make it binding on the corporation. It was further held that, where the officers of a corporation do an act in excess of the corporate power, the corporation is not bound, and when the statute under which the corporation acts restricts its action to a particular mode, none of the agents through whom the corporation acts can bind it in any other than the mode prescribed. This is a very instructive and well-considered case. In *Mayor etc. of Baltimore v. Reynolds*, 83 Am. Dec. 535, it was held that a person dealing with agents who act under special or express authority, whether written or verbal, is bound at his peril to know what the power of the agent is and to understand its legal effect, and if the agent exceeds the boundary of his legal powers, the act, as far as it concerns the principal, is void. The authorities are collated and distinguished in this case, and, in answer to the plea of hardship, the court quotes from *Lee v. Munroe*, 7 Cranch, 370, where it said: ⁵⁹¹ "It is better that an individual should now and then suffer by such mistakes, than to introduce a rule, against an abuse of which, by proper collusions, it would be very difficult for the public to protect itself." In fact, the rule is so universal that it seems unnecessary to cite further authority.

But we are not without precedent in our own decisions. In *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063, it was held, in common with universal authority, that wherever a person enters into a contract with an agent of a municipal corporation, he must at his peril ascertain the extent of such agent's authority, and if he fails to do so, he alone must suffer the consequences. It is also said: "The power to ratify a particular contract presupposes the power to make it in the first instance; and if it is such that it could not be made originally except in a certain prescribed mode, where that mode is disregarded the power to ratify does not exist. A contract which is invalid because not authorized by law cannot be made valid and binding retroactively by any subsequent action of the corporate body, and a liability be thereby fastened upon the corporation": Citing *Zottman v. San Francisco*, 20 Cal. 97, 81 Am. Dec. 96; *Nielson Pavement Co. v. Painter*, 35 Cal. 704; *McPherson v. Foster*, 43 Iowa, 48, 22 Am. Rep. 215; *Bryan v. Page*, 51 Tex. 532, 32 Am. Rep. 637.

In *Chehalis County v. Hutcheson*, 21 Wash. 82, 75 Am. St. Rep. 818, 57 Pac. 341, a case where a great hardship was worked upon the appellant by the application of this rule, where the appellant, who was a school superintendent for Chehalis

county, and had visited schools under a statute which allowed a certain compensation therefor, but which statute was afterward pronounced unconstitutional by this court, it was held that the county would not be estopped from disputing the validity of the warrants which had been issued in payment of such claims, for the ⁵⁹² reason that the contract would be void ab initio by virtue of the original lack of authority upon the part of the commissioners. The court announced, as the reason of the rule which governs the decision in this case, that the acts of the officers were unauthorized and void, and that one dealing with them was bound to take notice of the extent of their powers, citing 2 Herman on Estoppel, page 1365, to the effect that: "The true principle in such cases is well settled that one cannot do indirectly what cannot be done directly, and where there is no power or authority vested by law in officers or agents, no void act of theirs can be cured by aid of the doctrine of estoppel. Where there is power, and it is irregularly exercised, or there are defects and omissions in exercising the authority conferred by law, the doctrine of equitable estoppel may well be applied by courts."

In the case at bar there was no power on the part of the municipality to enter into this contract. The power was conferred upon the voters. The city had authority only to put the machinery in motion which would elicit and determine the will of the voters. The discretion and authority were conferred upon the voters, and not upon the officers of the city.

Affirmed.

Reavis, Fullerton, Anders, and White, JJ., concur.

MUNICIPAL CORPORATION.—AN ULTRA VIRES CONTRACT entered into by a municipal corporation is void: *Nashville v. Sutherland*, 92 Tenn. 335, 36 Am. St. Rep. 88, 21 S. W. 674. The doctrine of ultra vires is applied with greater strictness to municipal bodies than to private corporations: *Newberry v. Fox*, 37 Minn. 141, 5 Am. St. Rep. 830, 33 N. W. 333. The agents and officers of a municipal corporation cannot bind it by any contract that is beyond its powers. And all persons dealing with it or them must, at their peril, ascertain the extent of its powers: *Winchester v. Redmond*, 93 Va. 711, 57 Am. St. Rep. 822, 21 S. W. 1001. Neither estoppel, or ratification, or bona fide holding can be invoked to enforce against a municipality its ultra vires contract: *Portland v. Bituminous Pav. Co.*, 33 Or. 307, 72 Am. St. Rep. 713, 52 Pac. 28.

HALL v. UNION CENTRAL LIFE INSURANCE CO.

[23 Wash. 610, 63 Pac. 505.]

LIFE INSURANCE—AGENTS—ACTS OF, WHEN BINDING—PRESUMPTION AS TO CONTINUANCE OF AGENCY.—When a life insurance company has held a person out as its agent, the company is bound by his acts, and the agency will be presumed to continue until the contrary is proved.

LIFE INSURANCE—ACTION—ADMISSIONS OF AGENT—ADMISSIBILITY AND BINDING EFFECT OF.—When it is the duty of an agent of a life insurance company to collect and pay premiums to it, his admissions concerning such payments, made by a decedent in his lifetime, are admissible in evidence, in an action on the policy, and binding on the company, though such admissions were not made at the time of the execution of the contract of insurance.

LIFE INSURANCE—SECRET CONTRACT BETWEEN AGENT AND SUBAGENT—LIABILITY OF COMPANY.—Neither corporations nor individuals can escape their honest liabilities by secret understandings between principals and agents. Hence, if a person is employed as agent of a life insurance company, but, by a secret contract between him and the company's general agent, he is to be simply a subagent, and he is held out as agent of the company, with power to collect and pay over premiums to its general agent, the company must answer for collections made by him but not turned over to it.

LIFE INSURANCE—ACTION ON POLICY—WHEN NOT BARRED BY DELAY.—Though a policy of life insurance requires that an action thereon shall be commenced within a year from the death of the insured, it cannot be held that an action commenced after the expiration of nineteen months from such death is barred, where the company promised to pay if the premiums had been paid, and prevailed upon the plaintiff to wait until after the year had expired for the return of their agent from the Klondike country, to whom it was claimed the premiums had been paid. Nor will a court say that such delay was unreasonable, as a matter of law, where the question of reasonableness was submitted to the jury and found in favor of the plaintiff.

John E. Humphries and Harrison Bostwick, for the appellant.

Martin, Joslin & Griffin, for the respondent.

611 DUNBAR, C. J. This is an action by the respondent against the appellant on a policy of insurance issued upon the life of her husband, George E. Hall, deceased. On a trial by jury verdict was rendered in favor of the plaintiff for the amount sued for, and judgment was entered in accordance with the verdict, from which this appeal is taken. There are some

twenty-one assignments of error set forth in appellant's brief, the most of which are discussable under the second and third assignments, viz., that the court erred in denying the motion of appellant for nonsuit, and that the court erred in denying the motion of appellant in the challenge to the whole evidence, and in not taking the case from the jury. The substance of these objections might have been raised on error alleged in allowing incompetent testimony. It is contended by the appellant that defendant's challenge to the sufficiency of the testimony ought to have been sustained, for the reason that there was no testimony that the deceased had complied with the provisions and conditions of the policy, the only testimony introduced being declarations and admissions of one John Doser, who, it is admitted by the appellant, had formerly been a district agent for the appellant, and who, it is maintained by the respondent, was the agent at the time the declarations were made. Many authorities are cited by the appellant to sustain the proposition that the admissions of a discharged agent are not competent evidence to bind such agent's former principal. Conceding, for the purpose ⁶¹² of this investigation, the correctness of the rule contended for, the cases are not applicable to the facts proven in this case, as determined by the jury. As to the existence of Doser's agency, the plaintiff showed his appointment by the company, and there was no proof that such agency had been revoked. Under the rule that where an agency is shown to exist, it will be presumed to continue until the contrary is proved, it must be concluded that Doser was the agent of the company at the time these alleged admissions were made. His first appointment was made in December, 1896, and was to continue for ten years, unless terminated by service of notice upon him by the company. If there is anything in the proof that would indicate that he had been removed, it would be his second appointment, in December, 1898, where he was appointed by P. F. Leavy, general agent of the Union Central Life Insurance Company; and it is not shown that this appointment was revoked prior to the time the alleged declarations were made. We think sufficient evidence went to the jury to sustain the verdict on that ground. In any event, the testimony shows that the company held him out as an agent, and it is bound by his acts.

But it is contended by the appellant that these admissions, if made, were not of the *res gestae*, were not within the scope of the agent's authority, and were mere hearsay, and many

cases are cited in support of the contention that the admission of an agent must be made at the time of the contract. We do not think these cases are applicable to the case at bar. Doser's admissions were not with reference to the making or effect of any contract, but with relation to the payment of the premiums during the decedent's lifetime. Under the contract it was his duty to collect and pay to the company these identical premiums. Under such circumstances an admission in relation to such collections ⁶¹³ would be within the scope of his duties as agent, and the evidence was competent to bind the principal: *Wright v. Stewart*, 19 Wash. 179, 52 Pac. 1020.

It is true that under the conditions of the contract between P. F. Leavy, who was the general agent of the company, and Doser, it is provided that "although the said John Doser shall be styled and addressed as agent for said company, it is yet distinctly understood to be the purport and intent of this agreement that he shall be the agent of said P. F. Leavy alone, and that no liability is hereby created against said company, nor shall said John Doser, party of the second part, create any such liability." It would seem that comment upon such a stipulation in an agreement were unnecessary. It is too late in the history of jurisprudence, if such time ever existed, to allow corporations or individuals to escape their honest liabilities by secret understandings between principals and agents of which the public has, and can have, no knowledge. Under this contract, which provides that Doser shall work for the company, although he was to be the agent of Leavy only, he is clothed with authority not only to solicit and procure persons to insure with said company, but to collect and pay over the premiums to the agent of the company; and the company cannot escape its responsibilities when he does collect them from his patrons and fails to turn them over to the company: *Hart v. Niagara Fire Ins. Co.*, 9 Wash. 620, 38 Pac. 213.

Another question involved raises the question of limitation of the commencement of the action. The policy provides that the action shall be commenced within a year from the death of the insured. The death of the insured occurred on October 27, 1897, and the action was not commenced until June 13, 1899, and it is contended by the respondent that the action is barred. But the testimony ⁶¹⁴ shows that the respondent was attempting to get her policy paid without the expense of a lawsuit; that she was told by Mr. Newbegin, who was then the general agent of the company, that the money would be paid if it was

found that the payments had been made, and that it was best to wait until Mr. Doser, whom it was claimed the payments had been made to, and to whom the testimony shows the payments were actually made, returned from the Klondike country. On this proposition the evidence is conclusive and undisputed that the respondent was led by these representations on the part of the agent of the company to wait until after the year had expired. It is insisted, however, by the appellant that even if that be true, the length of time was unreasonable. But that matter was submitted by the court to the jury, by their verdict they have found that it was not unreasonable, and the court cannot, as a matter of law, under all the circumstances of the case, say that it was.

Many objections to the instructions of the court are made, and error is based upon the refusal of the court to grant the instructions asked for; but we think the court gave instructions that were applicable to the pleadings and circumstances proven upon the trial, that the law was properly given to the jury, and that, without particularly traversing them, the instructions asked by the appellant, and which were mostly based upon the theory of the case which we have been discussing, were properly refused.

It is insisted that the court erred in giving certain oral instructions after the request to have the jury charged by written instructions. In answer to this assignment it is sufficient to say that it does not appear from the record that any oral instructions were given by the court.

There is also an assignment to the effect that the court erred in overruling a demurrer to the respondent's complaint, 615 but from the record we are unable to discover that any demurrer to the complaint was interposed.

There seems to be no meritorious defense to this action, and no prejudicial error of law having occurred, the judgment will be affirmed.

Anders, Reavis, Fullerton, and White, JJ., concur.

INSURANCE—AGENT.—Where an insurance company has appointed an agent, parties dealing with him have a right to rely upon the fact of a continuance of his authority until informed of its revocation; *Wilson v. Commercial etc. Assur. Co.*, 51 S. C. 540, 64 Am. St. Rep. 700, 29 S. E. 245.

INSURANCE.—ON THE ADMISSIBILITY against insurance companies of declarations and admissions of, and conversations with, their agents, see *Sandford v. Orient Ins. Co.*, 174 Mass. 416, 75 Am. St. Rep. 358, 54 N. E. 883; *Graham v. Fire Ins. Co.*, 48

S. C. 195, 59 Am. St. Rep. 707, 26 S. E. 323; Georgia Home Ins. Co. v. Wharton, 113 Ala. 479, 59 Am. St. Rep. 129, 22 South. 288.

AGENCY.—PRIVATE LIMITATIONS upon an agent's authority are not binding on parties having no knowledge thereof: Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96; Brown v. Franklin etc. Ins. Co., 165 Mass. 565, 52 Am. St. Rep. 534, 43 N. E. 512.

REINER v. CRAWFORD.

[23 Wash. 669, 63 Pac. 516.]

EVIDENCE AS TO WHETHER WRITING EVER BECAME OPERATIVE.—PAROL EVIDENCE is admissible to show that a writing, in the form of a contract, never became operative as a contract. In other words, a separate agreement, constituting a condition precedent to the attaching of any obligation under the writing, may be shown by parol evidence.

INSTRUCTIONS — APPEAL — NECESSITY OF EXCEPTION.—An objection that the trial court erred in giving an instruction cannot be considered on appeal where no exception thereto was taken.

APPEAL—INSTRUCTIONS GIVEN AT APPELLANT'S REQUEST.—Error in giving an erroneous instruction cannot be urged on appeal by one at whose request it was given.

APPEAL—EVIDENCE—VERDICT WILL NOT BE DISTURBED, WHEN.—An appellate court will not weigh the evidence to determine whether or not the jury arrived at a correct verdict. It will not be disturbed where there is some substantial evidence to support it.

Winston & Winston and Meyers & Warren, for the appellant.

H. N. Martin, for the respondent.

670 FULLERTON, J. This is an action brought by the appellant against the respondent to recover damages alleged to have accrued by reason of the failure of the respondent to comply with the terms of a written contract, by the terms of which the respondent agreed to sell and deliver to appellant certain shares of stock in the Deer Trail No. 2 Mining Company. The instrument sued on was executed at Davenport, Washington, and the shares of stock at that time were in the hands of the respondent's agent at Spokane, Washington, who had authority to sell and contract for the sale of the same. The respondent in his answer to the complaint admitted the execution of the instrument, but denied that it ever became operative, averring that it was delivered to appellant upon the express

understanding and condition that it was not to take effect if the respondent's agent at Spokane had sold the stock, or entered into a contract for the sale of the same, prior to the time the appellant reached Spokane and notified the agent of the contract of purchase; further averring that in fact the agent had contracted to sell the stock on the day preceding the execution of the writing sued on, and that the shares of stock were delivered to the purchaser prior to the time appellant reached Spokane. Issue was taken on the answer, and a trial was had before the court and a jury, resulting in a verdict and judgment for the respondent.

On the trial the court permitted the respondent, over the objection of the appellant, to prove by oral evidence the conditional delivery of the writing. This is assigned as error, being, it is contended, in violation of the rule that parol evidence is inadmissible to contradict or vary the terms of a written instrument. But we think the rule invoked is not applicable to the question here suggested. To ⁶⁷¹ show that a writing in the form of a contract was delivered to take effect on the happening or the not happening of a condition, and that the condition on which it was made to depend has happened or has not happened, as the case may be, does not in any true sense contradict the terms of the writing or vary their legal import, but is, rather, the showing of a separate agreement constituting a condition precedent to the attaching of any obligation under the writing. In other words, while parol evidence is inadmissible to vary or contradict the terms of a written instrument, such evidence is admissible to show that a writing in the form of a contract never became operative as a contract. This principle is generally approved by the authorities: 2 Wharton on Evidence, 3d ed., sec. 927; *Wilson v. Powers*, 131 Mass. 539; *Ware v. Allen*, 128 U. S. 590, 9 Sup. Ct. Rep. 174; *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. Rep. 816; *Benton v. Martin*, 52 N. Y. 570; *Reynolds v. Robinson*, 110 N. Y. 654, 18 N. E. 127; *McFarland v. Sikes*, 54 Conn. 250, 1 Am. St. Rep. 111, 7 Atl. 408; *Cleveland Refining Co. v. Dunning*, 115 Mich. 238, 73 N. W. 239; *Merchant's Nat. Bank v. McAnulty*, (Tex. Civ. App.), 31 S. W. 1091; *Bourke v. Van Keuren*, 20 Colo. 95, 36 Pac. 882; *Hurlburt v. Dusenbery*, 26 Colo. 240, 57 Pac. 860.

The second contention is that the trial court erred in instructing the jury that they would be warranted in finding for the defendant if they found by a preponderance of the evidence

that the contract was delivered on the condition set out in the answer, whereas, it is said, the court should have instructed the jury that they could not find for the respondent unless they found by clear and convincing proof that the contract was so conditionally delivered. Conceding the law to be as the appellant here contends, there are two reasons why the objection cannot ⁶⁷² avail him. No exception was taken by him to this part of the charge of the court; and an inspection of the record shows that the charge was given in this form at his request.

Lastly, it is insisted that the verdict of the jury is contrary to the evidence. On this branch of the case the appellant argues that a conditional delivery of the contract is not shown by even a preponderance of the evidence, when nothing less than clear and convincing proof is sufficient. On which side the evidence preponderated was a question for the jury, and this court, as we have repeatedly held, will not weigh the evidence for the purpose of determining whether or not the jury arrived at a correct conclusion. We will do no more than examine the record, and, if we find some substantial evidence supporting the verdict, will not disturb the jury's finding. Whether the jury should have been instructed to find for the respondent on a preponderance of the evidence, or on clear and convincing proof, was a question of law, which the appellant should have raised at the trial in the court below before the cause was submitted to the consideration of the jury. By requesting, as he did, that the jury be instructed that they might find on this issue on a preponderance of the evidence, the appellant waived his right to predicate error thereon, either on a motion for a new trial, or on appeal to this court.

The judgment is affirmed.

Dunbar, C. J., and Reavis, J., concur.

CONTRACT.—PAROL EVIDENCE IS ADMISSIBLE to show whether a paper ever became a contract, or to show that a contract never had a valid existence. And there may be an oral agreement which constitutes a condition on which the performance of a written agreement is to depend: See the monographic note to *Harris v. Murphy*, 56 Am. St. Rep. 661, 664. On parol evidence to prove the conditional delivery of a writing, see *McFarland v. Sikes*, 54 Conn. 250, 1 Am. St. Rep. 111, 7 Atl. 408.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

CHAMBERLAIN v. PRUDENTIAL INSURANCE COMPANY OF AMERICA.

[109 Wis. 4, 85 N. W. 128.]

LIFE INSURANCE—WHEN COMPLETE—REPRESENTATION OF AGENT.—If the application for life insurance stipulates that the insured incurs no liability until the policy is issued and delivered, there can be no recovery in the absence of such issuing and delivery, though the first premium is paid, and the agent who solicited the insurance assured the applicant that it would go into effect at once.

LIFE INSURANCE—WRITTEN CONTRACT OF, CANNOT BE VARIED BY PAROL.—A written contract of life insurance, which is not to go into effect until the application has been accepted, and a policy issued and delivered, cannot be varied by parol evidence that the insurance agent told the applicant that the insurance would go into effect at once.

LIFE INSURANCE—ACTION—EVIDENCE OF TRANSACTION WITH DECEASED PERSON—ADMISSIBILITY.—Under a statute which excludes the testimony of a party as to transactions personally had with a deceased person, when the opposite party "sustains his liability" from, through, or under such deceased person, the wife of a deceased person may, in an action by her upon an alleged contract of life insurance made with him, testify as to a conversation between him and the agent of the insurance company, because the company does not sustain its liability, "from, through, or under" the insured.

Action on an alleged oral contract of life insurance. The transaction was had between the defendant company, and one H. C. Chamberlain, on April 25, 1899. Chamberlain consented to take five hundred dollars insurance on his life, at a premium of thirty-five cents per week. He signed a printed blank application, filled out by the agent, handed it back to the latter with-

out reading it, and paid him thirty-five cents. This application contained the following clause: "I further agree that no obligation shall exist against said company on account of this application although I may have paid premiums thereon, unless said company shall issue a policy in pursuance thereof, and the same is delivered to me." The agent gave a receipt, conforming with this clause, for the thirty-five cents, and said in substance that the insurance would go into effect at once. Most of the conversation between the agent and Chamberlain was had in the presence of the plaintiff, the latter's wife. On the evening of the same day, a physician asked some questions as to Chamberlain's health, and filled in the answers given upon the physician's blank, which was signed by the physician and Chamberlain. The application was forwarded to the company, but no policy was ever issued, because the company was dissatisfied with one of the physician's answers. Chamberlain was accidentally killed in a railway accident on May 2, 1899. The company, after notice of death, denied liability, because the application had never been acted upon and no policy had been issued, and this action was brought. The defendant paid the thirty-five cents into court. A verdict for five hundred dollars and interest was directed for the plaintiff, and the defendant appealed.

McElroy & Eschweiler, Van Dyke & Van Dyke & Carter, and W. D. Van Dyke, for the appellant.

Quarles, Spence & Quarles and W. C. Quarles, for the respondent.

7 WINSLOW, J. While this was in form an action to establish and enforce an oral contract of life insurance, it was in fact an attempt to alter the terms of a written contract by parol evidence. That the application of Chamberlain, and the receipt given by the agent of the defendant, constituted a written contract which was certain in its terms, cannot be doubted. This contract, in substance, was that, if the company accepted the application and issued a policy thereon, Chamberlain was to be insured in the sum of five hundred dollars thereby, and the thirty-five cents would constitute the first week's premium; but, if the application was not accepted, then the company incurred no obligation. There was no fraud claimed or proven. The most that was claimed was that Chamberlain did not read either the application or the receipt, and that the agent said that the insurance would go into effect

at once. But parties cannot thus escape the effect of written contracts. Chamberlain could read, and he was clearly guilty of negligence in not ascertaining what agreements the written papers contained, and neither he nor those claiming under him can escape the effects of that negligence. The written contract is binding and must control. If, under the circumstances disclosed here, written contracts could be set aside, they would be of little value: *Dowagiac Mfg. Co. v. Schroeder*, 108 Wis. 109, 84 N. W. 14. Nor is there room to say that the evidence tended to prove an oral contract of present insurance in consideration of thirty-five cents paid, in addition to the application for a written policy of insurance. There ^s was but one amount of thirty-five cents paid, and that, as the receipt states, was paid on account of the application for the written policy of insurance. Being so paid and applied by the parties, it manifestly could not serve as a consideration for the separate oral contract; so the oral contract, even if made, would be without consideration to support it.

The case of *Mathers v. Union etc. Assn.*, 78 Wis. 588, 47 N. W. 1130, was relied on by respondent as supporting the recovery in this case, and it seems probable that the direction of the verdict in this case was based upon that decision. The facts in that case were somewhat different from those now before us, yet it must, in fairness, be admitted that some things said in the opinion tend to justify the ruling of the trial court in this case. Careful consideration, however, brings us to the conclusion that, so far as the decision in that case conflicts with the conclusions now reached, it must be considered as overruled.

The plaintiff was allowed to testify, against objection and exception, to the conversation between her husband and the agent of the defendant, and this ruling is now assigned as error. The objection made was that the testimony was inadmissible under section 4069 of the Statutes of 1898, which excludes testimony of a party as to transactions personally had with a deceased person when the opposite party "sustains his liability" from, through, or under such deceased person. The question is, Does the insurance company, in any sense, sustain its liability "from, through, or under" Chamberlain? We do not see how the question can be answered in the affirmative. It is true that the insurance company was dealing with Chamberlain in the transaction, but it was the opposite party in the deal. It sustained its liability, if any, through its contract with Chamberlain, but in no reasonable meaning of words through or under Chamberlain. We perceive no error in the ruling.

By the Court. Judgment reversed, and action remanded for a new trial.

WHEN A CONTRACT OF INSURANCE IS COMPLETE is the subject of the monographic note to New York Life Ins. Co. v. Babcock, 69 Am. St. Rep. 143-153. Actual delivery of the policy is not essential to its validity, unless expressly made so by the terms of the contract: New York Life Ins. Co. v. Babcock, 104 Ga. 67, 69 Am. St. Rep. 134, 30 S. E. 273.

BAUM v. BAUM.

[109 Wis. 47, 85 N. W. 122.]

HUSBAND AND WIFE—SEPARATION AGREEMENT.—An oral contract between a husband and wife, without the intervention of a trustee, to separate and live apart, is absolutely void, as against the legislative policy of the state.

HUSBAND AND WIFE—SEPARATION AGREEMENT—CONSIDERATION.—An agreement by a husband to assign insurance policies to his wife for no other consideration than a covenant on her part to live separate and apart from him is without a valid consideration and will not be enforced, though it has been partially executed.

HUSBAND AND WIFE—SEPARATION AGREEMENT—ACTION AS TO SEPARATE ESTATE.—If a husband agrees to assign insurance policies to his wife in consideration of her separating and living apart from him, an action by her to enforce the assignment is not an action regarding her separate estate, where she has no property.

Action by a wife against her husband and an insurance company. The husband and wife had agreed to live separate and apart, the husband agreeing, in consideration of his wife's living separate and apart from him, to make an absolute and unconditional assignment to her of certain insurance policies. Assignments were executed, but the husband reserved the power to make choice of any tontine options granted under the conditions of the policies. Upon learning this the wife brought her action, asking that the assignments be adjudged to be absolute, and to vest the beneficial interest in them in her. The complaint was demurred to on the ground that the plaintiff had no legal capacity to sue, and that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled and the defendant appealed.

Turner, Pease & Turner and J. H. Turner, for the appellant.
Bloodgood, Kemper & Bloodgood, for the respondent.

⁵⁰ BARDEEN, J. Counsel for the respondent have relieved us of any doubt as to the ultimate purpose of this action. In their brief they say, "This is an action to reform a contract already made so that it will express the true meaning and ⁵¹ intent of the parties, which, by mistake and inadvertence, it failed to do." The contract set out in the complaint is an oral one between wife and husband, to live separate and apart. The wife agrees to nothing beyond the mere fact of separation. As a part of said agreement, the husband agrees to contribute money for the support of his wife and children. This he was legally bound to do without any agreement. Another part of the husband's agreement was to make an absolute and unconditional assignment of certain insurance policies on his life. This, it appears, he has failed to do, and it is this part of the agreement which is sought to be enforced in this action. Although not distinctly so alleged, the plain inference is that the parties were then living together as man and wife. The question is fairly presented for the first time in this court whether, under the circumstances stated, an oral contract between husband and wife, without the intervention of a trustee, to separate and live apart, will be enforced.

An attempt is made to separate the agreement to assign the insurance policies from the other branches of the contract, the theory being that because section 2347 of the Statutes of 1898 permits a husband to assign a policy of insurance to his wife, the imperfect execution of such assignment may be corrected and enforced in a suit by the wife. This statute, however, has no application to the question. We must go back to the original contract. On the one side, the wife's only agreement is to separate and live apart from her husband. In consideration thereof, the husband agrees to contribute to her support and the support of their children, and to assign the insurance policies by an absolute assignment. He fails to carry out this agreement. Will it be enforced? In opposition to its enforcement it is said that it is without consideration and is void as against public policy.

No similar question has been decisively considered by this court. The nearest approach to it is the case of *Rolette v.* ⁵² *Rolette*, 1 Pinn. 370, 40 Am. Dec. 782, which was an action brought by the husband against his wife and the trustee mutually chosen, to set aside the deed of separation, and a bond and

mortgage to secure it given by the husband to the trustee. The latter contained provisions requiring the husband to pay the wife an annuity quarterly. The husband claimed that the deed, bond, and mortgage were without any sufficient consideration, and were void as being contrary to the policy of the law in relation to marriage, and against the interest, order, and happiness of society. The complaint showed that the parties had been living apart for some time when the deed and other papers were executed. In discussing the situation the court used the following language: "The deed herein set forth is not a deed for the separation of the plaintiff and his wife, and which, as such, would have been obnoxious to many of the authorities cited by the counsel for the complainant, but is a deed for the separate maintenance of the wife made and entered into many years after the separation had taken place." The ultimate conclusion was that deeds of this kind were allowable and would be sustained by the court. This decision simply goes to the extent of holding that after a separation has taken place the court will uphold a written agreement of separation and for the wife's support, when made through the intervention of a trustee.

When we come to consider the literature on this subject and review the multitude of cases in which it has been considered, we are struck at once with the lack of harmony of opinion, and with the diversity of decisions. This may be accounted for in a measure by the want of uniformity in the laws regulating the marriage status. In England the unwritten law did not permit the courts to dissolve a marriage or separate the parties on their consent or by confession of one of them. An act of parliament carefully pointed out for what causes separations might judicially be permitted. ⁵³ Yet, by what Mr. Bishop terms as "one of the most marvelous judicial somersaults ever witnessed in any country," the English courts now permit the parties to mutually agree to a separation either identical with or differing from the judicial one, as they may prefer, proceeding on a cause which the law allows or forbids, or on no cause, and will enforce specific performance: 1 Bishop on Marriage, Divorce, and Separation, secs. 1263, 1264. The binding nature of this sort of bargains seems to have been placed upon the ground that the law gave the wife the power to bring, to defend, and to settle divorce suits, and, therefore, she can make an agreement whereby such a suit is avoided. This seems to be in utter defiance of the law which has existed from the earliest times, forbidding the courts from upholding or sanction-

ing separation, in pais or in court, except upon proof of grounds legally defined and declared sufficient. This change of law is justified upon the ground that public opinion had changed as to the question of public policy involved, and which was by the judges considered a sufficient justification for them to change the law: *Besant v. Wood*, 12 Ch. Div. 605-620. In this country such a complete overturning of settled rules can never be justified, except in obedience to legislative enactment. Our ideas of "public policy" are such as may be gathered from the constitution and the laws and the course of administration and decision. When the will of the people has become crystallized into legislative enactment, and a given subject has been surrounded by regulations, limitations, and restrictions, the courts are bound to consider them as indicating a definite policy, and to yield obedience thereto. In the practical administration of justice, the expressed will of the people overrides and controls the individual opinions of judges, and finds expression in decisions in harmony therewith. Any other course would be revolutionary and in opposition to the spirit of our form of government.

In the different states the laws regulating the marriage ⁵⁴ status are so diverse that, before giving credit or weight to a judicial decision thereunder, it becomes quite essential to ascertain the legislative policy which finds expression in the laws enacted. Hence, the citation of decisions from other states is of no helpful value unless it can be said that their legal policy is in harmony with our own. In England, in former times, and in most of the states, as well as our own, the doctrine is recognized that there are always three parties to a marriage contract—the husband, the wife, and the state. The reason is that the state has a special interest in each individual marriage, and permits its dissolution only in those circumstances and cases wherein it deems the public interest will not be thereby impaired: 1 *Bishop on Marriage, Divorce, and Separation*, sec. 72. By reason of this special interest, stringent laws have been enacted, prescribing the terms and conditions upon which a marriage may be contracted, and regulating with equal strictness the means and grounds of its dissolution. *Prima facie*, therefore, each particular marriage is beneficial to the public, each divorce prejudicial. From this arises the rule of law that agreements promotive of marriage are valid, and those in aid of separation and divorce are void. There can never be a divorce by agreement or consent of parties. Without dissent, the courts unite in condemning all applications for a dissolu-

tion of the marriage where there is a suggestion of collusion. In harmony with the idea that circumstances might arise during cohabitation rendering it unfit or impossible for the parties to continue together in the close relation of man and wife, the legislature has seen fit to mention certain grounds upon which a separation from bed and board may be adjudged. With the wisdom of this legislation we are not concerned. We must accept it as the will of the people, and administer it according to its spirit and letter. The fact that such legislation is to be found on our statute books is a strong reason for saying that it was the legislative purpose that only such separation shall be recognized ⁵⁵ as has received judicial sanction. It being universally conceded that an absolute divorce will not be granted upon consent or agreement of the parties, there would seem to be equally as strong reason for holding that an agreement for separation, which is the equivalent of a limited divorce, should not be recognized. In other words, it is for the courts, and not the parties, to determine whether proper grounds for a separation exist or not. To uphold such agreements substitutes the will of the parties for the judgment of the judicial tribunal established by law to decide such questions. We need not turn to other states for precedents. The question turns upon the legal policy of this state, as evidenced by legislative enactments. An agreement for voluntary separation is distinctly against such policy, and for that reason must be held to be absolutely void.

The agreement in question was oral, and but partially executed. The usual form of such bargains is by a deed between the husband, the wife, and a third person acting as her trustee: 1 Bishop on Marriage, Divorce, and Separation, sec. 1286. We need not inquire whether under our statute the intervention of a trustee is necessary or not. Admitting, as has been held in some jurisdictions (*Dutton v. Dutton*, 30 Ind. 452), that a parol agreement fully executed would be recognized in equity, still that rule does not apply here. This action is to enforce the specific performance of a portion of the original agreement—an agreement having no consideration, so far as the husband is concerned, further than a present covenant on the part of the wife to separate. Such an agreement, we must hold, is contrary to the legal policy of this state, and will not be enforced. It implied a direct renunciation of stipulated duties—a dereliction of those mutual offices which the parties are not at liberty to desert by agreement between themselves. It substituted the will of the parties for the judgment of the court,

and involved the assumption of a false character in both parties, contrary to ⁵⁶ the marriage contract and subversive of the interests of society. The reason given by the chancellor in *Rogers v. Rogers*, 4 Paige, 516, 27 Am. Dec. 84, meets our approval, when applied to the case before us. When an agreement has been made after separation in such a way that it may be enforced, as in *Rolette v. Rolette*, 1 Pinn. 370, 40 Am. Dec. 782, the law tolerates it, but will not regard it with favor.

The assertion that this is a suit regarding the separate property of the wife cannot be recognized. It affirmatively appears in the complaint that she had no property, but was dependent upon her own exertions and the help of relatives. It is to make these insurance policies a part of her separate property that this suit is brought. To do so, she must revert to the original contract, which, as we have seen, has no binding force.

By the Court. The order of the circuit court is reversed, and the cause is remanded with directions to sustain the demurrer, and for further proceedings according to law.

Agreements Respecting the Living Separate and Apart of Husband and Wife—Their Validity and Effect.*

Contracts, Generally, Between Husband and Wife.—It is well understood that a husband and wife were incapable, as a rule, of contracting with each other at the common law: *Hendricks v. Isaacs*, 117 N. Y. 411, 15 Am. St. Rep. 524, 22 N. E. 1029; *Pillow v. Wade*, 31 Ark. 678; *Jenne v. Marble*, 37 Mich. 319. Under the enabling statutes of some of our states a husband and wife may make many contracts with each other: See the monographic note to *Kantrowitz v. Prather*, 99 Am. Dec. 599-610, on the power of married women to contract under American statutes including direct conveyances between them; see the monographic note to *Wilder v. Brooks*, 88 Am. Dec. 54-56, on direct conveyance from husband to wife; *Story v. Marshall*, 24 Tex. 305, 76 Am. Dec. 106; *De Vries v. Conklin*, 22 Mich. 255; *Burdono v. Amperse*, 14 Mich. 91, 90 Am. Dec. 225. In other states, however, the "stubborn and inflexible" doctrine of the common law, that a husband and wife could not contract with each other, has been held to remain unchanged by their legislation, and the wife is disabled from making a binding contract with her husband: *Hendricks v. Isaacs*, 117 N. Y. 411, 15 Am. St. Rep. 524, 22 N. E. 1029; and it may be said here that statutes relating to the separate property of a married woman and her right to her real and personal property do not give her a right to personally contract

*REFERENCES TO MONOGRAPHIC NOTES.

Deeds and agreements between husband and wife for separation: 90 Am. Dec. 367-370.

Direct conveyances from husband to wife: 88 Am. Dec. 54-56.

Power of married women to contract under American statutes: 99 Am. Dec. 599-610.

with her husband: *Heacock v. Heacock*, 108 Iowa, 540, 75 Am. St. Rep. 273, 79 N. W. 353. There is no authority in the books to show that a man and his wife can, by agreement between themselves, change the legal capacities and characters that belong to that relation: *Beach v. Beach*, 2 Hill, 260, 38 Am. Dec. 584; and they cannot dissolve the marriage relation, either wholly or partially, by any agreement between themselves: *Helms v. Franciscus*, 2 Bland, 544, 20 Am. Dec. 402. But it is "too wide a proposition" to say that a married woman, even without an enabling statute, cannot contract in any case: See *Besant v. Wood*, 12 Ch. Div. 605, 621. It has long been the law that, while a husband and wife cannot, by any agreement of their own, effect even a partial dissolution of the marriage contract, yet they are allowed to agree to live apart; and, as auxiliary to that agreement, if the husband stipulate through the instrumentality of a third person, to allow and pay to his wife a separate maintenance, such a stipulation is legal, and may be enforced against the husband, either in a court of law, or of equity, although it has originated out of and relates to that unauthorized state of separation in which the husband and wife have endeavored to place themselves: *Helms v. Franciscus*, 2 Bland, 544, 20 Am. Dec. 402; *People v. Mercein*, 3 Hill, 399, 38 Am. Dec. 644.

Agreements for Separation—Public Policy.—"For a great number of years," said Jessel, M. R., in *Besant v. Wood*, 12 Ch. Div. 605, 620, "both ecclesiastical judges and lay judges thought it was something very horrible, and against public policy, that the husband and wife should agree to live separate, and it was supposed that a civilized country could no longer exist if such agreements were enforced by courts of law, whether ecclesiastical or not. But a change came over judicial opinion as to public policy; other considerations arose, and people began to think that, after all, it might be better and more beneficial for married people to avoid, in many cases, the expense and the scandal of suits of divorce by settling their differences quietly by the aid of friends out of court, although the consequence might be that they would live separately, and that was the view carried out by the courts when it became once decided that separation deeds per se were not against public policy." "There is certainly nothing illegal in an agreement for a husband and wife to live separate and to divide their property. There is no moral turpitude in such a contract, nor can it be said at this day to be otherwise than in accord with the public policy of England and of the United States": *Daniels v. Benedict*, 97 Fed. 367, 372, per Sanborn, Circuit Judge. See, also, *Stebbins v. Morris*, 19 Mont. 115, 47 Pac. 642; *Bowers v. Hutchinson*, 67 Ark. 15, 53 S. W. 399; *Rains v. Wheeler*, 76 Tex. 390, 13 S. W. 324. "Many reasons," says Sanborn, Circuit Judge,

in *Daniels v. Benedict*, 97 Fed. 367, 372, "suggest themselves to the thoughtful mind why a wise and enlightened public policy should encourage and enforce voluntary agreements of separation between husbands and wives whose wranglings, quarrels, and domestic infelicities have rendered their homes places of torment to themselves, and of discontent and misery for their children. We refrain from reciting these reasons here, because the public policy of a nation or of a state is not to be sought in the opinions of individual judges, or through a consideration of the better reasons, but must be ascertained by a comprehensive view of its laws and judicial decisions relative to the subject matter in question." But, however this may be, the law has been too long settled, both in the courts of law and equity, in England and in this country, that a valid agreement, through the interposition of a trustee, for immediate separation between a husband and wife, and for a separate allowance for her support, to admit of a discussion of the soundness of the doctrine upon which the cases have proceeded: *Walker v. Walker*, 9 Wall. 743; *Calkins v. Long*, 22 Barb. 97, 103.

Necessity of Trustee.—In view of the fact that the power to sever the matrimonial tie is vested in the courts alone, and of the general rule that a married woman had no contractual capacity at common law, the doctrine that a contract entered into by a married woman and her husband for separation is enforceable without enabling statutes, has been thought to trench strongly on judicial legislation: *Stebbins v. Morris*, 19 Mont. 115, 47 Pac. 642. "But contracts of this nature," says Mr. Justice Davis, in *Walker v. Walker*, 9 Wall. 743, 750, "for the separate maintenance of the wife, through the intervention of a trustee, have received the sanction of the courts in England and in this country for so long a period of time that the law on the subject must be considered as settled." As said in the principal case the usual form of such bargains is by a deed between the husband, the wife, and a third person acting as her trustee. In fact, many cases hold that the intervention of a trustee in such arrangements is necessary: *Barbee v. Armstead*, 10 Ired. 530, 51 Am. Dec. 404; *Stephenson v. Osborne*, 41 Miss. 119, 90 Am. Dec. 358; *Rogers v. Rogers*, 4 Paige, 516, 27 Am. Dec. 84; *Simpson v. Simpson*, 4 Dana, 140; *Tourney v. Sinclair*, 3 How. (Miss.) 324; *Carter v. Carter*, 14 Smedes & M. 59; *Poillon v. Poillon*, 49 App. Div. 341; 63 N. Y. Supp. 301; and that separation agreements between a husband and wife alone, without the intervention of a trustee, are unenforceable, if not absolutely void: See the principal case; *Stephenson v. Osborne*, 41 Miss. 119, 90 Am. Dec. 358; *Collins v. Collins*, Phill. Eq. 153, 93 Am. Dec. 606; *Rogers v. Rogers*, 4 Paige, 516, 27 Am. Dec. 84; *In re Smith's Estate*, 36 N. Y. Supp. 820; 13 Misc. Rep. 592; *Morgan v. Potter*,

17 Hun. 403; *Simpson v. Simpson*, 4 Dana, 140; *Whitney v. Closson*, 138 Mass. 49; *Tourney v. Sinclair*, 3 How. (Miss.) 324; *Carter v. Carter*, 14 Smedes & M. 59; especially where they are partly executory in character: *Scherer v. Scherer*, 23 Ind. App. 384, 77 Am. St. Rep. 437, 55 N. E. 494; *Whitney v. Closson*, 138 Mass. 49; but see the last paragraph of this subdivision. A separation contract between a husband and wife, invalid because not made through a trustee, cannot be made the basis of an action by the wife for the recovery of an allowance, which the husband has agreed to pay: *Poillon v. Poillon*, 49 App. Div. 341; 63 N. Y. Supp. 301. If the husband, under such a contract, has agreed to pay a specified sum monthly for the support of the parties' children, no recovery can be had, where no equitable consideration is shown, because the contract is void: *Lawrence v. Lawrence*, 66 N. Y. Supp. 393, 32 Misc. Rep. 503, reversing the same case, 64 N. Y. Supp. 1113, 31 Misc. Rep. 646. A separation agreement made directly between a husband and wife, without the intervention of a trustee, cannot be specifically enforced, even as to the property included in it: *Carter v. Carter*, 14 Smedes & M. 59; and such an agreement constitutes no bar to an action at law by the husband for the recovery of the property from his wife: *Tourney v. Sinclair*, 3 How. (Miss.) 324. Where there is no third party to a contract of separation between a husband and wife, no suit thereon, either at law or in equity, can be maintained, either for damages or specific performance: *Simpson v. Simpson*, 4 Dana, 140. A release by a husband to his wife directly, upon a separation agreement, is void: *Mills v. Richards*, 34 Miss. 77.

The validity, however, of separation agreements between man and wife, made through the interposition of a trustee, as most of them are made, is not now questioned. If the relations between a man and his wife are such as to make a separation inevitable, or if the conduct of one is such as to make a separation necessary for the health and happiness of the other, a post-nuptial agreement between them, reasonable and just in its provisions, for an immediate separation and to live apart, and whereby the husband agrees to pay to a trustee money, or to convey to him property, for the support and maintenance of his wife, in contemplation of an immediate separation, which takes place as contemplated, is not contrary to public policy, or otherwise illegal, but is a contract enforceable both under the laws of England: *Jee v. Thurlow*, 2 Barn. & C. 547; *Wilson v. Mushett*, 3 Barn. & Adol. 743; *Frampton v. Frampton*, 4 Beav. 287; *Gibbs v. Harding*, 5 Ch. App. 336; *Besant v. Wood*, 12 Ch. Div. 605; *Rodney v. Chambers*, 2 East, 283; *Wilson v. Wilson*, 1 H. L. Cas. 538; *Worrall v. Jacob*, 3 Mer. 256, 268; *Logan v. Birkett*, 1 Mylne & K. 220; *Wellesley v. Wellesley*, 10 Sim. 256; and of our states: *Wells v. Stout*, 9 Cal. 479; *Nichols v. Palmer*, 5 Day, 47; *Chapman v. Gray*, 8 Ga. 341; *Phil-*

lips v. Meyers, 82 Ill. 67, 25 Am. Rep. 295; Reed v. Beazley, 1 Blackf. 96; McKee v. Reynolds, 26 Iowa, 578, 589; Fox v. Davis, 113 Mass. 255, 18 Am. Rep. 476; Griffin v. Banks, 37 N. Y. 621; Tallinger v. Mandeville, 113 N. Y. 427, 21 N. E. 125; Clark v. Fosdick, 118 N. Y. 7, 16 Am. St. Rep. 733, 22 N. E. 1111; Calkins v. Long, 22 Barb. 97; Magee v. Magee, 67 Barb. 487; Allen v. Affleck, 10 Daly, 509; Carson v. Murray, 3 Paige, 483; Bettie v. Wilson, 14 Ohio, 257; Hitner's Appeal, 54 Pa. St. 110; Buckner v. Ruth, 13 Rich. 157; Rains v. Wheeler, 76 Tex. 390, 13 S. W. 324; Squires v. Squires, 53 Vt. 208, 38 Am. Rep. 668; Walker v. Beal, 3 Cliff. 155, Fed. Cas. No. 17,065; Daniels v. Benedict, 97 Fed. 367. In Sparks v. Sparks, 94 N. C. 531, Switzer v. Switzer, 26 Gratt. 574, and Harshberger v. Alger, 31 Gratt. 52, the question as to the validity of separation agreements between man and wife was left undecided.

An agreement of separation between a husband and wife and a third person, by the terms of which the former is to pay the latter a specified sum toward the support of the wife and her children, constitutes the third person a trustee of an express trust, and authorizes an action to enforce the trust to be brought in his name: Clark v. Fosdick, 118 N. Y. 7, 16 Am. St. Rep. 733, 22 N. E. 1111. A deed for the separate maintenance of a wife, made through the medium of a trustee after the separation has taken place, is also valid: Rolette v. Rolette, 1 Pinn. 370, 40 Am. Dec. 782; Squires v. Squires, 53 Vt. 208, 38 Am. Rep. 668; Winn v. Sanford, 148 Mass. 39, 18 N. E. 677; Rains v. Wheeler, 76 Tex. 390, 13 S. W. 324; Wells v. Stout, 9 Cal. 479; Magee v. Magee, 67 Barb. 487; Hughes v. Cuming, 36 App. Div. 302; 55 N. Y. Supp. 256; Lawson v. Lawson, 56 App. Div. 535; 67 N. Y. Supp. 356. But an agreement between a husband and wife, while they are living together as such, for their immediate separation, and for a specified allowance for her support, made through the medium of a trustee, to be valid, must be made in respect to a separation which has occurred, or which is to occur immediately, and not in contemplation of a future possible separation: Clark v. Fosdick, 118 N. Y. 7, 16 Am. St. Rep. 733, 22 N. E. 1111; Carson v. Murray, 3 Paige, 483; Walker v. Walker, 9 Wall. 743, 751; Gaines v. Poor, 3 Met. (Ky.) 503, 79 Am. Dec. 559; Mercein v. People, 25 Wend. 64, 35 Am. Dec. 653; Fox v. Davis, 113 Mass. 255, 18 Am. Rep. 476; Chapman v. Gray, 8 Ga. 341; Wells v. Stout, 9 Cal. 479; Allen v. Affleck, 64 How. Pr. 380; 10 Daly, 509; Speidel's Appeal, 107 Pa. St. 18; Commonwealth v. Richards, 131 Pa. St. 209, 18 Atl. 1007; Randall v. Randall, 37 Mich. 563, 571. Contracts for the future separation of husband and wife are void as against public policy: Galusha v. Galusha, 116 N. Y. 635, 15 Am. St. Rep. 453, 22 N. E. 1114; Bolland v. O'Neil, 72 Conn. 217, 44 Atl. 15; Mercein v. People, 25 Wend. 64, 35 Am. Dec. 653; Gould v. Gould, 29 How. Pr. 441, 458;

Stebbins v. Morris, 19 Mont. 115, 47 Pac. 642; *Proctor v. Robinson*, 35 Beav. 329; *Westmeath v. Westmeath*, 5 Bligh, N. S., 339. Articles providing for a future separation cannot be supported, although the parties live together, without cohabitation as man and wife: *Westmeath v. Westmeath*, 1 Dow & C. 519; 5 Bligh, N. S., 339. Contracts which undertake to provide for the separation of husband and wife in the future are void, because they encourage the parties to neglect those duties in the fulfillment of which society has an interest, and allow them, in effect, to make the contract of marriage determinable on conditions fixed beforehand by themselves. On the other hand, an agreement for an immediate separation is made to meet an abnormal state of things, which could not have been contemplated beforehand; a condition or a state of things which, however undesirable in itself, has in fact become inevitable; *Bowers v. Hutchinson*, 67 Ark. 15, 53 S. W. 399.

The authorities, however, are not all one way concerning the validity of separation agreements between a husband and wife alone, without the intervention of a trustee. We have cited cases above, which hold that such agreements are unenforceable, if not absolutely void. It is apparent that a separation agreement made through a trustee is a perfectly formal and valid instrument, good either at law or in equity; and, while a trustee for the wife has been usually provided for by the articles of separation, in whose name suits on her behalf might be brought, it was long ago determined that, in equity, this was wholly unnecessary, and that equity, whenever it became needful, would give effect to provisions on her behalf by adjudging the husband to be her trustee and requiring him to account accordingly; *Randall v. Randall*, 37 Mich. 563, 572; *More v. Freeman*, Bunb. 205; *Jones v. Clifton*, 101 U. S. 225; *Commonwealth v. Richards*, 131 Pa. St. 209, 18 Atl. 1007; *Thomas v. Brown*, 10 Ohio St. 247, 250; *Miller v. Miller*, 16 Ohio St. 527. The rule in equity may, therefore, be announced as follows; that, where a husband and wife have agreed upon an actual and immediate separation, and have settled their property rights upon reasonable terms, fair and just to the wife, the intervention of a trustee is not necessary to the validity of the agreement, which will be supported in equity, where it has been consummated, and no claims of existing creditors, or of bona fide purchasers without notice, have intervened; *Thomas v. Brown*, 10 Ohio St. 247, 250; *Miller v. Miller*, 16 Ohio St. 527, 531; *McKee v. Reynolds*, 26 Iowa, 578, 589; *Hutton v. Hutton*, 3 Pa. St. 100; *Dillinger's Appeal*, 35 Pa. St. 357; *Hitner's Appeal*, 54 Pa. St. 110; *Jones v. Clifton*, 101 U. S. 225; *Commonwealth v. Richards*, 131 Pa. St. 209, 18 Atl. 1007; *Bowers v. Hutchinson*, 67 Ark. 15, 53 S. W. 399; *Dutton v. Dutton*, 30 Ind. 452; *McKenna v. Phillips*, 6 Whart. 571, 37 Am. Dec. 438; *Robertson v. Robertson*, 26 Iowa,

350. As said by Mr. Justice Field, in *Jones v. Clifton*, 101 U. S. 225, 228: "The technical reasons of the common law arising from the unity of husband and wife, which would prevent a direct conveyance of property from him to her for a valuable consideration, as upon a contract or purchase, have long since ceased to operate in the case of a voluntary transfer of property as a settlement upon her. The intervention of trustees, in order that the property conveyed may be held as her separate estate beyond the control or interference of her husband, though formerly held to be indispensable, is no longer required." And where either party to a contract of separation between a husband and wife, made without the interposition of a trustee, has received the full benefit of the contract, it will, if otherwise valid, be enforced in equity: *Bowers v. Hutchinson*, 67 Ark. 15, 53 S. W. 399.

As shown above, in this subdivision, many of the courts have clung to the old doctrine that the intervention of a trustee is essential to the validity of an agreement for a separation between man and wife, but the more correct and modern rule, in view of enabling statutes concerning the authority of married women to make contracts, is that no such intervention is necessary, either at law or in equity: *Stebbins v. Morris*, 19 Mont. 115, 47 Pac. 642; *Randall v. Randall*, 37 Mich. 563, 572; *Hutton v. Hutton*, 3 Pa. St. 100; *Hitner's Appeal*, 54 Pa. St. 110; *Commonwealth v. Richards*, 131 Pa. St. 209, 18 Atl. 1007; *Robertson v. Robertson*, 25 Iowa, 350; *Carey v. Mackey*, 82 Me. 516, 17 Am. St. Rep. 500, 20 Atl. 84. Thus, under the statute of Kansas, a wife is capable of contracting with her husband, and conveyances of property directly from one to the other will be upheld so far as it is equitable to do so. In that state there are not the obstacles to a contract between husband and wife which exist in some of the states, nor is there the same necessity for the intervention of a trustee in conveying or transferring property from one to the other; and a post-nuptial separation agreement between a man and wife, without a trustee controlling the division and affecting the descent of property, will be upheld, where it was fully and intelligently made, and is just and equitable in its provisions: *King v. Mollohan*, 61 Kan. 683, 60 Pac. 731. So, in Colorado, the intervention of a trustee is not essential to the validity of an agreement of separation between a husband and wife, and a contract of separation to which they are the sole parties is valid under the statutes of that state, both at law and in equity: *Daniels v. Benedict*, 97 Fed. 367, 376. It will be observed that such an agreement under the common law was enforceable in equity: See cases above cited in this subdivision on the point; *Daniels v. Benedict*, 97 Fed. 367, 376; and compare the subdivision, *infra*, "Actions on Separation Agreements," including suits for specific performance. And even under the English married women's property act of 1882,

45 and 46 Victoria, chapter 75, where a separation deed has been executed by a husband and wife alone, without a trustee, the husband covenanting to pay an annuity to the wife, and she covenanting not to molest, annoy, or interfere with him, and the wife sues him to recover arrears of the annuity, she can maintain her action, notwithstanding her adultery, which resulted in the birth of a child: *Sweet v. Sweet*, [1895] 1 Q. B. 12.

Limitations Upon Rule.—The rule that separation agreements between a man and wife, properly drawn, are valid, is clearly subject to some limitations, some of which have been shown above. Thus, it has been made to appear that an agreement for a separation which is to take place in the future is void as against public policy, and that, after such an agreement is entered into, its terms must be immediately complied with on peril of nullity. It is also essential to the validity of such an agreement, under some of the authorities, that, at the time of its being made, the relations between husband and wife should have been of such a character as to render the separation a matter of reasonable necessity for the health or happiness of the one or the other. This has also been indicated above. There must be, according to the weight of authority in this country, a moving cause for the separation in addition to the mere mutual volition of the parties. If it is the outcome of mutual caprice only, or of a reckless disregard of the obligation of the marital tie, then the courts will not enforce it: *Stebbins v. Morris*, 19 Mont. 115, 47 Pac. 642; *Boland v. O'Neil*, 72 Conn. 217, 44 Atl. 15; *McCronklin v. McCronklin*, 2 B. Mon. 370; *Poillon v. Poillon*, 49 App. Div. 341; 63 N. Y. Supp. 301; though it is held in the well-considered case of *Daniels v. Benedict*, 97 Fed. 367, 379, that the cause or reason for the making of an agreement of separation between a husband and wife is for their own consideration exclusively; that the question of its sufficiency, as affecting the validity of the contract, is not open for the consideration of the courts; and that the contract will stand, even if the parties deem that the cause for it was inadequate, or there was no cause for it. It would, of course, follow from this view, that a party pleading the agreement as a cause of action or matter of defense need not aver or prove that it was fair and just to the wife: *Daniels v. Benedict*, 97 Fed. 367. In *Stebbins v. Morse*, 19 Mont. 115, 47 Pac. 642, it is said, however, that: "In almost all the cases that we have investigated, either from the recitals in the agreement for separation itself, or from extrinsic evidence offered in connection therewith, the court has had before it an unhappy condition of marital relations as a moving cause for the contract. Judges have carefully discriminated between agreements for separation, outgrowths of domestic sorrow, entered into for the purpose of avoiding public scandal or notoriety, and those which have resulted from a wanton or reckless disregard of one of the highest

obligations of life—the duty which the husband and wife mutually owe to each other and to the public at large. In this view of the law, an agreement for separation of the latter kind would be a mere usurpation of the power conferred upon the courts alone to adjust marital dissensions in decrees of divorce,” per Buck, J. Where the only apparent cause or reason for the agreement is the convenience of the parties in meeting each other, and the concealment of their true relation from the public, for an indefinite period, the contract will be held invalid as contrary to good morals and the public welfare: *Boland v. O’Neil*, 72 Conn. 217, 44 Atl. 15. And a separation deed is wholly void where there is no separation: *Bindley v. Mulloney*, L. R. 7 Eq. 343.

Validity of Separation Agreements.—Ordinarily, a contract of separation between a man and wife must be by deed and be signed by the wife: *Barbee v. Armstead*, 10 Ired. 530, 51 Am. Dec. 444; and see *Carter v. Carter*, 14 Smedes & M. 59; but a parol agreement, if fully executed on the part of the husband, will be upheld in equity: *Dutton v. Dutton*, 30 Ind. 452. A deed of separation acknowledged by a husband and wife may be good, though not acknowledged by the trustee, as where it contains no covenants, grants or concessions from him: *Goddard v. Beebe*, 4 G. Greene, 126. If a wife, in executing articles of separation, conveys land to a trustee for her husband’s benefit, the husband is not protected by the officer’s certificate of acknowledgment to the deed, as would be a bona fide purchaser, but the wife or her heirs may show that she was influenced to make the deed by such causes as would invalidate it: *Caffey v. Caffey*, 12 Tex. Civ. App. 616, 35 S. W. 738. A consideration is, of course, necessary to support an agreement of a husband and wife to live separate and apart, and for her maintenance and support; but while a want of consideration has frequently been raised as an objection to the validity of articles of separation, the courts have found little difficulty in discovering a consideration, where the articles were otherwise valid. It would not be profitable to undertake here a minute discussion of the question of consideration, because of the fact that there seems to have been few cases in which there was a want of consideration. It may be said, however, that upon an agreement for immediate separation, the wife’s release of all right of dower and other interests in her husband’s property, and a stipulation to keep him harmless and indemnified against all debts contracted by her, show a sufficient consideration from the wife to the husband: *Goddard v. Beebe*, 4 G. Greene, 126; *Randall v. Randall*, 37 Mich. 563, 572; *Wellesley v. Wellesley*, 10 Sim. 256; *Frampton v. Frampton*, 4 Beav. 287. As said in *Greenleaf v. Blakeman*, 40 App. Div. 371, 58 N. Y. Supp. 76: “The law recognizes the obligation upon the husband and father to provide for the support of his wife and children, and, when a husband and wife

have separated and are living apart, the covenant on behalf of the wife to accept from the husband a certain sum of money in lieu of this obligation of support and maintenance for herself and her children, together with a relinquishment by the wife of her dower in her husband's estate, and all interest in any property which he then owns or should subsequently acquire, with a relinquishment of the right to administer upon his estate in case of intestacy, is ample consideration for the promise of the husband to pay the wife the sum of money that has been agreed upon for the support and maintenance of herself and her children." That the duty to support forms a sufficient consideration in such cases, see *Phillips v. Meyers*, 82 Ill. 67, 25 Am. Rep. 295; and that the wife's undertaking to support herself is a valid consideration, see *Randall v. Randall*, 37 Mich. 563, 573. On the other hand, a husband's release of his marital rights in the future acquired property of his wife is a good consideration for the grant of an annuity by her upon a separation agreement: *Logan v. Birkett*, 1 Mylne & K. 220; and see *Worrall v. Jacob*, 3 Mer. 256. A covenant of indemnity, even against debts, amounts to a valuable consideration: *Worrall v. Jacob*, 3 Mer. 256, 270; *Joe v. Thurlow*, 2 Barn. & C. 547. A covenant by a third person to indemnify the husband against his wife's debts seems to be a valid and sufficient consideration in articles of separation: *Compton v. Collinson*, 2 Brown Ch. 377; *Wells v. Stout*, 9 Cal. 479; *Wilson v. Wilson*, 1 H. L. Cas. 538; but a deed of separation between a husband and wife, containing no covenant on the part of a trustee to indemnify the husband or other valuable consideration is not void on that account: *Frampton v. Frampton*, 4 Beav. 287. It seems that a separation agreement, as against the husband alone, is valid and binding though it contains no stipulation indemnifying him against the debts of his wife: *Reed v. Beazley*, 1 Blackf. 96; *Goddard v. Beebe*, 4 G. Greene, 126, 131. A conveyance of personal property, on a separation between husband and wife, by the former to a trustee for the use of the wife is valid, though no consideration moves from the trustee: *Griffin v. Banks*, 37 N. Y. 621. The stopping of a suit for a nullity of marriage on the ground of impotency on the part of the husband is a sufficient consideration to him for articles of separation: *Wilson v. Wilson*, 1 H. L. Cas. 538. A deed of separation, between a husband and wife, if executed without any consideration, is, of course, void at law, even between the parties to it; and it is void and of no effect even in equity, as against assignees of the husband, on the question of title to the property in dispute: *Cropsey v. McKinney*, 30 Barb. 47, 57. A contract entered into between a husband and wife, who are living apart by mutual consent, whereby the husband agrees to pay to his wife a certain sum each month for her support, is without consideration and cannot be enforced.

In the absence of a showing that the wife left her husband for reasons justified by law, she would have no claim against him for support, and any contract to furnish such support would, therefore, be without consideration: *Scherer v. Scherer*, 23 Ind. App. 384, 77 Am. St. Rep. 437, 55 N. E. 494.

In separation deeds between a husband and wife, the parties may agree upon a division or disposition of property, and either spouse may relinquish his or her interest in the property of the other, both present and prospective, actual or contingent, and such agreements, when made without coercion or undue influence, are very generally enforced, where their provisions are just and equitable: See the monographic note to *Stephenson v. Osborne*, 90 Am. Dec. 367-370; *Rains v. Wheeler*, 76 Tex. 390, 13 S. W. 324; *King v. Mollohan*, 61 Kan. 683, 60 Pac. 731; *Luttrell v. Boggs*, 168 Ill. 361, 48 N. E. 171; *Commonwealth v. Richards*, 131 Pa. St. 209, 18 Atl. 1007; *Robertson v. Robertson*, 25 Iowa, 350; *Goddard v. Beebe*, 4 G. Greene, 126; *Walker v. Beal*, 3 Cliff. 155, Fed. Cas. No. 17,065. In most of the older cases, the only interest in property relinquished by the wife in the agreement was her dower in the husband's lands, but in those jurisdictions where the spouses hold each an equal interest in the property acquired during marriage, the same principle should apply to deeds of separation which make a partition of the common property: *Rains v. Wheeler*, 76 Tex. 390, 13 S. W. 324.

An agreement between a husband and wife for a separation "during life," is valid and effectual, both at law and in equity, and is not invalidated as to the wife by a void provision in the agreement respecting the children: *Allen v. Affleck*, 64 How. Pr. 380; 10 Daly, 509. Collateral engagements between the husband and a third party, in such an agreement, will be executed, even where the articles of separation are condemned as against the policy of the law: *Champlin v. Champlin*, 1 Hoff. Ch. 55. The character of a separation agreement, providing that payments are to be made to a trustee, is not changed by the fact that they are made directly to the wife, with the assent of the trustee: *Hughes v. Cuming*, 36 App. Div. 302; 55 N. Y. Supp. 256.

It was held in *Stephenson v. Osborne*, 41 Miss. 119, 90 Am. Dec. 358, that a valid deed of separation was binding alone upon the husband and trustee; but the better opinion is, that while a contract between a husband and wife after their separation, through the intervention of a trustee, is effective to bind the husband to contribute the sum therein provided for her support: *Galusha v. Galusha*, 116 N. Y. 635, 15 Am. St. Rep. 453, 22 N. E. 1114; and see *Pettit v. Pettit*, 107 N. Y. 677, 14 N. E. 500; it is also binding on the wife and the trustee, that she will accept the payment therein designated in full satisfaction of her maintenance and support: *Galusha v. Galusha*, 116 N. Y. 635, 15 Am. St. Rep. 453,

22 N. E. 1114. And other cases hold that a valid agreement between a husband and wife to live separate and apart will be as valid and binding upon the wife as upon the husband, though the agreement was made without the intervention of a trustee: *Scott's Estate*, 147 Pa. St. 102, 23 Atl. 214; *Commonwealth v. Richards*, 131 Pa. St. 209, 18 Atl. 1007; *Lehr v. Beaver*, 8 Watts & S. 102, 42 Am. Dec. 271; *Hilbish v. Hattle*, 145 Ind. 59, 44 N. E. 20.

Separation agreements, made for the purpose of facilitating divorce, or a dissolution of the marriage relation, are, of course, illegal and void as contrary to public policy: *Sayles v. Sayles*, 21 N. H. 312, 53 Am. Dec. 208; *Stebbins v. Morris*, 19 Mont. 115, 47 Pac. 642; *Goodwin v. Goodwin*, 4 Day, 343; *Birch v. Anthony*, 109 Ga. 349, 77 Am. St. Rep. 379, 34 S. E. 561; but an agreement for separation made before the commencement of divorce proceedings, or even pending a divorce suit, without any collusive intent as to the matter of divorce, is not invalid: *Stebbins v. Morris*, 19 Mont. 115, 47 Pac. 642; *Schmieding v. Doellner*, 10 Mo. App. 373. It has even been held that a separation agreement is not invalid because there was, at the time of its execution, an understanding between the parties that an early divorce would be obtained: *King v. Mollohan*, 61 Kan. 683, 60 Pac. 731. A separation agreement and adjustment of property rights, made after one of the parties has been so at fault as to warrant a divorce, is not a consent by either to a divorce, nor does it justify an inference that the cause of divorce was brought about by mutual consent: *Ogilvie v. Ogilvie*, 37 Or. 171, 61 Pac. 627. Where a separation has been induced, not by collusion, but by the vicious conduct of one of the parties, without inducement or fault of the other, and it has furnished just grounds for divorce, a contract looking to a settlement of the property rights and the proper maintenance of the one not in fault may be entered into without violating any rule as to public policy: *Henderson v. Henderson*, 37 Or. 141, 82 Am. St. Rep. 741, 60 Pac. 597, 61 Pac. 136.

A separation agreement executed before separation by the wife, under moral coercion, is void and not binding on her: *Hungerford v. Hungerford*, 16 App. Div. 612; 44 N. Y. Supp. 973. Any separation agreement, which is the result of fraud, coercion or duress is not sustainable; as where the wife was induced to enter into the agreement by false representations of the husband: *Robertson v. Robertson*, 25 Iowa, 350; or where the agreement was entered into by her through fear of her husband, and to purchase immunity from cruel and inhuman treatment at his hands, with which she was threatened, or to which she was subjected by him in order to compel her to consent to a separation: *Galusha v. Galusha*, 138 N. Y. 272, 278, 33 N. E. 1062; *Hungerford*

v. Hungerford, 16 App. Div. 612; 44 N. Y. Supp. 973. A transaction, whereby an insolvent transfers his property to his wife and child, without any consideration, except an agreement between himself and his wife to live separate and apart from each other, is fraudulent and void as to existing creditors: *Morgan v. Potter*, 17 Hun, 403. See, also, *Kehr v. Smith*, 20 Wall. 31, for a voluntary settlement with a wife, not sustainable against creditors; but a provision made in a separation agreement, by a husband for his wife, is not void as against subsequent creditors, if he was solvent at the time: *Wells v. Stout*, 9 Cal. 479. A wife can make no agreement for separation by her attorney; *Wallingsford v. Wallingsford*, 6 Har. & J. 485, 490; and a mere agreement of a husband and wife to live apart will not sustain a claim for separate maintenance without a contract to that effect. Separate maintenance is payable only during the separation: *Helms v. Franciscus*, 2 Bland, 544, 20 Am. Dec. 402. When a marriage is regularly solemnized, its consummation by coition between the parties is not necessary to its validity, and its validity cannot, therefore, be affected by a preliminary or collateral agreement of the parties not to live together: *Franklin v. Franklin*, 154 Mass. 515, 26 Am. St. Rep. 266, 28 N. E. 681.

Construction of Separation Agreements.—The object of the covenants, in a deed of separation, between the husband and the trustee, is to give efficacy to the agreement between the husband and the wife: *Worrell v. Jacob*, 3 Mer. 256, 268; but, assuming that the provision to live separate and apart is contrary to public policy and invalid, this does not destroy that part of the contract which adjusts property rights. That part of the agreement relating to the separation and living apart may be rejected and the other sustained: *Luttrell v. Boggs*, 168 Ill. 361, 48 N. E. 171. An agreement of separation between husband and wife, and for the wife's separate maintenance, is void as to the separation, but good as to the maintenance: *Helms v. Franciscus*, 2 Bland, 544, 20 Am. Dec. 402; but the contract of separation is valid, so far as it relates to the indemnity given to the husband by the trustee: *Galusha v. Galusha*, 116 N. Y. 635, 15 Am. St. Rep. 453, 22 N. E. 1114. A separation between a husband and wife in pursuance of mutual articles of agreement cannot be enforced, in this country, either at law or in equity, because it would be against the policy of the law: *McBreen v. McBreen*, 154 Mo. 323, 77 Am. St. Rep. 758, 55 S. W. 463; *Buttlar v. Buttlar*, 57 N. J. Eq. 645, 73 Am. St. Rep. 648, 42 Atl. 755; but a court will not suffer a husband, who has become possessed of the property of his wife by virtue of such an agreement, to avail himself of his own wrong in order to free himself from the duty to maintain her: *Buttlar v. Buttlar*, 57 N. J. Eq. 645, 73 Am. St. Rep. 648, 42 Atl. 755. A husband's promise, in a separation agreement, concerning the custody of

his child, is separable from his promise to support his wife, and the latter promise is valid, whether the former is or not: *Grime v. Borden*, 106 Mass. 198, 44 N. E. 216; and while an agreement of separation, of itself, may be against public policy, a provision therein, whereby the husband gives his wife a certain house and lot and money, and which are accepted by her in contemplation of her husband's continued abandonment, have the effect of placing the property beyond his control, and of vesting it in her for her separate use, although no third party intervened as a trustee for the wife: *Hiram v. Griffin*, 8 Bush, 262, 266. A stipulation, in an agreement for separation, concerning a division of property is not void because it cannot be at once executed: *Stebbins v. Morris*, 19 Mont. 115, 122, 47 Pac. 642; but an invalid release, by the wife, of her right of dower in her husband's lands, does not render the agreement for separation inoperative as a release of her right to share in his personal property: *Bowers v. Hutchinson*, 67 Ark. 15, 53 S. W. 399. If a man and woman live together, not in matrimony, and determine to separate, whereupon a deed is executed by them in which he absolutely covenants to pay her an annuity for life, or so long as she shall not molest him, and shall perform a covenant on her part contained in the deed, such absolute covenant will be construed to mean what it says, and not as a covenant lasting only so long as the parties shall live separate and apart. There is no analogy between such a case and a separation deed between a man and wife, and the covenantor's obligation to pay the annuity does not cease by implication upon the parties subsequently resuming cohabitation: *In re Abdy*, [1895] 1 Ch. 455.

Effect of Separation Agreements.—It has been held that, where a husband promises, in a separation agreement, to pay to his wife a certain monthly allowance, but discontinues payment after paying several installments, he cannot set up the agreement in bar of her action for a support, although he discontinued the payments because she demanded an increase of the allowance: *Cram v. Cram*, 116 N. C. 288, 21 S. E. 197. "It is not," said the court, "the contract to pay a certain sum in lieu which quits the husband of his duty to furnish a support for the wife when he is discharged, but the actual payment or attempt or offer to pay in fulfillment of his agreement": *Cram v. Cram*, 116 N. C. 288, 21 S. E. 197. But in Pennsylvania a valid deed of separation is held to be a bar to the wife's suit for support and maintenance: *Commonwealth v. Richards*, 131 Pa. St. 209, 18 Atl. 1007; and see *Brown v. Brown*, 5 Gill, 249, 2 Md. Ch. 316. Nor can an action for separation, on the ground of abandonment, be maintained by a wife, where she and her husband live apart under a separation agreement: *Powers v. Powers*, 33 App. Div. 126; 53 N. Y. Supp. 346. If a husband and wife are separated under a mutual agreement providing for the monthly payments of money by him for

her separate support in consideration of his becoming possessed of her property, payments accruing under such agreement may be decreed in equity on behalf of the wife, on the ground that the husband's possession of her property for the purpose of her support fastens upon him the duty and obligation to maintain her. In such a case, the husband may be required to satisfy out of the income of his business and property any deficiency arising in the amounts received by him from her property, required to meet his agreed monthly payments to her: *Buttlar v. Buttlar*, 57 N. J. Eq. 645, 73 Am. St. Rep. 648, 42 Atl. 755.

A husband is bound to support his wife where the two are separated by mutual consent, the same as where they are living in cohabitation: *Buttlar v. Buttlar*, 57 N. J. Eq. 645, 73 Am. St. Rep. 648, 42 Atl. 755; but where he has, in a separation agreement, made a proper provision for her, and makes payment according to his promise, he is not liable even for necessities furnished for her support: *Alley v. Winn*, 134 Mass. 77, 45 Am. Rep. 297; *Cany v. Patton*, 2 Ashm. 140; *Brown v. Brown*, 5 Gill, 249, 2 Md. Ch. 316; *Baker v. Barney*, 8 Johns. 72, 5 Am. Dec. 326. If, however, the husband's agreement to pay a certain sum to his wife, or to provide her with a separate maintenance, is not reduced to writing, and there is no evidence of a payment having been made, he is liable for goods furnished to his wife during the separation: *Baker v. Barney*, 8 Johns. 72, 5 Am. Dec. 326.

An agreement of separation between a husband and wife, though valid, does not prevent either from maintaining against the other an ordinary action for divorce, limited or absolute, according to the ground and the jurisdiction, whether the cause therefor occurred before or after such agreement was entered into: *Clark v. Fosdick*, 118 N. Y. 7, 16 Am. St. Rep. 733, 22 N. E. 1111; *J. G. v. H. G.*, 33 Md. 401, 3 Am. Rep. 183; *Fosdick v. Fosdick*, 15 R. I. 130, 23 Atl. 140; *Wood v. Wood*, 5 Ired. 674; *Stokes v. Stokes*, 1 Mo. 320, 324; *Anderson v. Anderson*, 1 Edw. Ch. 380; *Winn v. Sanford*, 148 Mass. 39, 18 N. E. 677; *Brown v. Brown*, 3 Prob. & Div. 202; but see *Brown v. Brown*, 5 Gill, 249, 2 Md. Ch. 316. Thus, the fact that a husband and wife live apart by mutual agreement is no bar to a suit for divorce brought by either against the other on the ground of adultery: *Franklin v. Franklin*, 154 Mass. 515, 26 Am. St. Rep. 266, 28 N. E. 681. In an action by a wife for a divorce for cruelty, it was held, however, in *Squires v. Squires*, 53 Vt. 208, 38 Am. Rep. 668, that an agreement for separation made two years before, after the acts of cruelty, and after actual separation, and substantially complied with by the husband, was a valid defense. So a man cannot consent to a separation, wait for the statutory period, and then obtain a divorce on the ground of desertion: *Rogers v. Rogers*, 84 Mo. App. 197. Nor can a wife, living separate and apart from her husband, under an agreement for

separation, maintain a suit for limited divorce upon the ground of abandonment and refusal to support, where she has not offered to return or proposed to restore the consideration received from her husband: *Desbrough v. Desbrough*, 29 Hun, 592. In England, a woman who is living separate and apart from her husband, under a deed of separation, is not, in an action by the husband to enforce the deed, entitled to a judicial separation on the ground of alleged cruelty, occurring before the deed was executed and more than five years prior to the commencement of his action. She is precluded by the lapse of time and the execution of the deed: *Besant v. Wood*, 12 Ch. Div. 605.

Articles of separation and a division of property do not bar the wife's claim against her husband for temporary alimony or suit money in an action for divorce, where she has not sufficient means: *Miller v. Miller*, 1 N. J. Eq. 386; *Wilson v. Wilson*, 40 Iowa, 230; *Miller v. Miller*, 43 How. Pr. 125; *Campbell v. Campbell*, 73 Iowa, 482, 35 N. W. 522; *Killiam v. Killiam*, 25 Ga. 186; *Coles v. Coles*, 2 Md. Ch. 341. Contra, *Middleton v. Middleton*, 18 Ill. App. 472, and in *Rose v. Rose*, 11 Paige, 166, it was held that the wife was not entitled to an allowance for alimony, or for the purpose of carrying on the suit against her husband, unless she and her trustee either surrendered, or offered to surrender, the voluntary settlement made upon her by the husband. Compare *Taylor v. Taylor*, 66 N. Y. Supp. 561; 32 Misc. Rep. 312; *Dailey v. Dailey*, 30 N. Y. Supp. 337; 9 Misc. Rep. 511.

The divorce of a husband and wife after they have entered into a valid agreement of separation, or the commission by either of them of an act entitling the other to a divorce does not avoid or annul such agreement, or entitle either to be released therefrom; and the court granting a decree errs if it disregards the agreement, and makes a provision for the wife inconsistent therewith: *Galusha v. Galusha*, 116 N. Y. 635, 15 Am. St. Rep. 453, 22 N. E. 1114; *Carey v. Mackey*, 82 Me. 516, 17 Am. St. Rep. 500, 20 Atl. 84; *Carpenter v. Osborn*, 102 N. Y. 552, 560, 7 N. E. 823; *Blaker v. Cooper*, 7 Serg. & R. 500; *Kremelberg v. Kremelberg*, 52 Md. 553; *Morall v. Morall*, L. R. 6 P. D. 98; *Jones v. Jones*, 1 Colo. App. 28, 27 Pac. 85. But see *Albee v. Wyman*, 10 Gray, 222. A valid separation agreement, for the payment of an allowance to the trustee for the wife's support, is not annulled by the subsequent granting of a divorce at her instance in an action in which no alimony was asked or granted, and the judgment in which did not refer to or in any respect purport to deal with such agreement: *Clark v. Fosdick*, 118 N. Y. 7, 16 Am. St. Rep. 733, 22 N. E. 1111.

Upon the death of a wife living separate and apart from her husband under a deed of separation, administration may be had on her estate: *McLaren v. Bradford*, 52 Ga. 648; and, as an agree-

ment of separation does not dissolve the marriage, it does not divest the wife of the first right to administer upon the estate of her husband: *Read v. Howe*, 13 Iowa, 50; unless she releases this right in the agreement, which is sometimes done. Contra, that neither the wife nor her nominee is entitled to letters of administration, in such a case, upon the death of her husband, see *In re Davis*, 106 Cal. 453, 39 Pac. 756.

Abrogation of Separation Agreements.—After the making of a valid separation agreement, it is not within the power of either party thereto, acting alone and against the will of the other, to do an act which will destroy or affect the contract: *Galusha v. Galusha*, 116 N. Y. 635, 15 Am. St. Rep. 453, 22 N. E. 1114; 138 N. Y. 272, 33 N. E. 1062; but such agreement is avoided or abrogated by the parties where there is a subsequent reconciliation and cohabitation, and resumption of the conjugal relation between them: *Zimmer v. Settle*, 124 N. Y. 37, 21 Am. St. Rep. 638, 26 N. E. 341; *Shelthar v. Gregory*, 2 Wend. 422; *Carson v. Murray*, 3 Paige, 483; *In re Smith's Estate*, 36 N. Y. Supp. 820; 13 Misc. Rep. 592; *Smith v. Terry*, 52 N. Y. Supp. 630; 24 Misc. Rep. 228; *Heyer v. Burger*, Hoff. Ch. 1; *Knapp v. Knapp*, 95 Mich. 474, 55 N. W. 353; *Wells v. Stout*, 9 Cal. 479; *Hitner's Appeal*, 54 Pa. St. 110; *Bateman v. Olivia*, 1 Dow, 235; *Westmeath v. Westmeath*, 5 Bligh, N. S. 339; particularly if the agreement is expressly annulled by the parties: *Keys v. Keys*, 11 Heisk. 425; *Kehr v. Smith*, 20 Wall. 31; *James v. James*, 81 Tex. 373, 16 S. W. 1087. Equity will cancel or rescind a separation agreement, if the parties afterward cohabit or live together as husband and wife by mutual consent: *Carson v. Murray*, 3 Paige, 483; *Smith v. King*, 107 N. C. 273, 12 S. E. 57; *Chapman v. Gray*, 8 Ga. 341; for ever so short a time: *Carson v. Murray*, 3 Paige, 483. Upon the avoidance of the agreement, the wife becomes entitled to her former rights: *Knapp v. Knapp*, 95 Mich. 474, 55 N. W. 353; and the husband's subsequent abandonment of his wife does not revive the agreement: *Shelthar v. Gregory*, 2 Wend. 422.

But to effect an abrogation of an agreement of separation, the reconciliation must be substantial, and followed by cohabitation, restoring the former relation of the parties. Mere access is not sufficient, if proved, to establish such a reconciliation and cohabitation as will avoid the agreement: *Wells v. Stout*, 9 Cal. 479. Even occasional acts of connubial intercourse between the husband and wife are not of themselves conclusive evidence that the separation has come to an end so as to avoid the agreement: *Rowell v. Rowell*, [1900] 1 Q. B. 9; *Heyer v. Burger*, Hoff. Ch. 1; especially where there has been no resumption of household life: *Hughes v. Cuming*, 36 App. Div. 302; 55 N. Y. Supp. 256; or where these acts might be done under the terms of the agreement.

with the wife's consent: *Hitner's Appeal*, 54 Pa. St. 110; *Walker v. Beal*, 3 Cliff. 155, Fed. Cas. No. 17,065. "It is not subsequent cohabitation alone," says Sanborn, Circuit Judge, in *Daniels v. Benedict*, 97 Fed. 367, 376, "which avoids such agreements, but the intentional renunciation of them, and the reconciliation which the resumption of marital relations sometimes evidences. So far as subsequent cohabitation establishes such an intention, and so far only, does it have the effect of avoiding the contract." Hence, if the separation agreement expressly provides that it shall remain in force although the parties come together again and live together as man and wife, occasional visits and cohabitation cannot be considered as establishing such an intention. Furthermore, a provision in a separation agreement that, if the parties again come together and live as husband and wife, it shall in no way abrogate or modify the agreement as to property rights, beyond entitling the wife to support, is not considered to be immoral or against public policy: *Daniels v. Benedict*, 97 Fed. 307, 377. A purpose on the part of a wife to resume marital relations is indicated by her offer to return all that she has received under the separation agreement, and the bringing of an action to cancel the agreement: *Hungerford v. Hungerford*, 16 App. Div. 612; 44 N. Y. Supp. 973. An offer of a husband to return and resume marital relations with his wife, when they are living separate under a mutual agreement, is not established by his uncorroborated testimony that he sent his friends to make such offer: *Buttler v. Buttler*, 57 N. J. Eq. 645, 73 Am. St. Rep. 648, 42 Atl. 755. If a husband and wife are living separate under a mutual agreement, his offer to return and resume marital relations with her, if duly proved, cannot defeat her right to recover in equity the arrears of payments due her under such agreement, while he retains the exclusive use and control of her property transferred to him by such agreement: *Buttler v. Buttler*, 57 N. J. Eq. 645, 73 Am. St. Rep. 648, 42 Atl. 755.

The validity of a husband's covenant for the maintenance of his wife, contained in a deed of separation between them, is not impaired by a provision therein that if the parties should afterward come together, the trust should remain and be executed in like manner as if they should remain separate: *Walker v. Walker*, 9 Wall. 743, 752; *Wilson v. Mushett*, 3 Barn. & Adol. 743. Nor is an agreement for separation invalidated because it contains a provision for the custody of children, as that matter is as proper a subject for provision in an agreement for separation between the parents as the wife's maintenance, or the division of property: *State v. Giroux*, 19 Mont. 149, 159, 47 Pac. 798; *Mercein v. People*, 25 Wend. 64, 35 Am. Dec. 653; *Allen v. Affleck*, 64 How. Pr. 380, 10 Daly, 509; *In re Besant*, 11 Ch. Div. 508; *Besant v. Wood*, 12 Ch. Div. 605. But an agreement between a husband and wife

recognizing the fact that they had ceased to live together, providing for their child's custody and the amount he is to pay for its and her support, and that divorce, or second marriage of either party is to terminate it, must be regarded as mutually abandoned by the parties when each has prosecuted a suit against the other for divorce; and the court is, therefore, authorized, in a suit by her against him, to make such decree as may be deemed proper respecting alimony and the custody of the child: *Atherton v. Atherton*, 155 N. Y. 129, 63 Am. St. Rep. 650, 49 N. E. 933. A reservation in a separation agreement of a right of the parties to visit each other, in case of sickness, by mutual consent, does not render the contract of separation void, though such stipulation is not carried out: *Carson v. Murray*, 3 Paige, 483. A man cannot, after the marriage of his daughter, reduce the allowance made to his wife in a deed of separation: *Biery v. Steckel*, 194 Pa. St. 445, 45 Atl. 376.

Release of Dower.—Under statutes requiring a married woman to join with her husband in a deed of conveyance to a third person in order to release her dower, it is not released unless done as required by the statute, although she endeavors to do so in a separation agreement: *Bowers v. Hutchinson*, 67 Ark. 15, 53 S. W. 399; *Carson v. Murray*, 3 Paige, 483. A provision in a valid separation agreement, made through a trustee, excluding a widow from all dower and interest in her husband's estate, will have that effect: *Hitner's Appeal*, 54 Pa. St. 110; *Garbut v. Bowling*, 81 Mo. 214. The wife's release of her claim for dower is a sufficient consideration for the separation agreement: *Bratton v. Massey*, 15 S. C. 277; and if she accepts a provision in a separation agreement, made through a trustee, in lieu of dower it will be held, after her husband's death, to bar her dower right: *Garbut v. Bowling*, 81 Mo. 214; *Loud v. Loud*, 4 Bush, 453; but the intent to bar her dower right must be clear, or it will not have that effect: *Shelton v. Shelton*, 20 S. C. 560; *Ireland v. Ireland*, 43 N. J. Eq. 311, 12 Atl. 184; especially where the agreement was simply between man and wife, not under seal, and not acknowledged as prescribed by statute: *Walsh v. Kelly*, 34 Pa. St. 84. In *Watkins v. Watkins*, 7 Yerg. 283, it was held that a wife's right to dower and distribution was not barred by a trust deed for separate maintenance; and in *Parham v. Parham*, 6 Humph. 286, that she might avoid a deed of separation and settlement at her election, and elect to take dower and a distributive share in her husband's estate, in which case she would, however, be required to account for the property conveyed in the deed, which was not expended for her support and maintenance during coverture.

But in some of the states the rights of married women have been greatly enlarged by statute, and reason and justice require, as well as security for these rights, that the contracts of a married

woman, lawfully made, should bind her and be enforced against her, as well as upheld, when they are for her benefit. Consequently, a release by a wife, in a valid agreement of separation, though made without a trustee, relinquishing her right of dower in his real estate, will be upheld: *Robertson v. Robertson*, 25 Iowa, 350; *McKee v. Reynolds*, 26 Iowa, 578; though, aside from an agreement to separate, it is not competent in the state of Iowa for one to convey to the other his or her dower interest in real estate: *McKee v. Reynolds*, 26 Iowa, 578. See, also, *Randall v. Randall*, 37 Mich. 563, 572; and compare *King v. Mollohan*, 61 Kan. 683, 60 Pac. 731; *Luttrell v. Boggs*, 168 Ill. 361, 48 N. E. 171; *Daniels v. Benedict*, 97 Fed. 367.

A valid separation agreement between a man and wife, acknowledged and recorded, and wherein each agrees to live apart, and to release to the other all "interest, right, and title to any and all real estate," etc., which the other possessed at the time of their marriage, bars the right of the husband to assert dower after the death of his wife: *Luttrell v. Boggs*, 168 Ill. 361, 48 N. E. 171; and a contract entered into between a husband and wife, whereby he was to pay her a certain sum of money and she was to join him in deeds of conveyance and relinquish her dower in other lands, and both were to live separate and absolve each other from all obligations as husband and wife, while not enforceable at law, may, after complete performance, be successfully interposed as an equitable defense to an action brought by him to secure possession, as tenant by the curtesy, of property which she subsequently acquired with her own means, although it was not her separate, equitable estate: *McBreen v. McBreen*, 154 Mo. 323, 77 Am. St. Rep. 758, 55 S. W. 463; but if the parties separated by agreement and set apart to the wife one-third of land descended to her from her father, free from all claims of the husband, without any stipulation as to the residue, on which the husband continued to reside, until the death of his wife, his tenancy was derived by the curtesy through his wife: *Dooley v. Baynes*, 86 Va. 644, 10 S. E. 974.

Effects of Death and Rights of Survivor.—When a wife voluntarily and advisedly enters into an agreement of separation with her husband, and accepts and retains property conveyed to her by her husband in execution of the agreement, and lives apart from him during the remainder of his life, a court of equity will not, after his death, set the agreement aside, and restore her to rights in his estate, which she surrendered for the consideration received: *Daniels v. Benedict*, 97 Fed. 367, 382; *Hilbish v. Hattle*, 145 Ind. 59, 44 N. E. 20; *Dillinger's Appeal*, 35 Pa. St. 357; *Hitner's Appeal*, 54 Pa. St. 110; *Rains v. Wheeler*, 76 Tex. 390, 13 S. W. 324. A wife is barred from claiming any share of her husband's estate under the intestate laws, where she has, in a valid deed of separation, re-

leased him from all duties, liabilities, and obligations of marriage, and the husband, during his lifetime, has fully performed his undertaking, in good faith to support and maintain her, and the provision for that purpose was reasonable: *Scott's Estate*, 147 Pa. St. 102, 23 Atl. 214; *Speidel's Appeal*, 107 Pa. St. 18. So, where each has waived all rights in the other's property, acquired or to be hereafter acquired: *Aspey v. Barry*, 13 S. Dak. 220, 83 N. W. 91. And a wife's relinquishment, in a valid deed of separation, of all claim to a distributive share of the husband's personal estate, in case she survives him, will bind her: *Miller v. Miller*, 16 Ohio St. 527; *Loud v. Loud*, 4 Bush, 453; *McCubbin v. Patterson*, 16 Md. 179. A wife who lives separate and apart from her husband, under a valid agreement for separation, is not a member of the immediate family of the husband, and, upon his death is not entitled to an allowance for her maintenance, out of his estate, under the code; *Estate of Noah*, 73 Cal. 583, 2 Am. St. Rep. 829, 15 Pac. 287.

But in those jurisdictions holding that a separation agreement entered into between a husband and wife, without the intervention of a trustee, and whereby the one relinquishes all claim against the estate of the other, is void for want of capacity in married persons to contract with each other, a wife, upon her husband's death, would be entitled to a share of his estate, though she had previously relinquished all claim upon his property in a deed of separation, executed without the intervention of a trustee: *Whitney v. Closson*, 138 Mass. 49. And, where a separation agreement, made through a trustee, requires the husband to divide the community property, but he dies without having done so, the wife may share in the estate: *Andrus v. Randon*, 34 Tex. 506. The wife's right to share in her husband's estate is not cut off, however, though she lived apart from him for a few years prior to his decease, where there is nothing in the agreement to show that it was the intention of the parties to bar her right to a distributive share of his estate: *Newton v. Truesdale*, 69 N. H. 634, 45 Atl. 646.

A covenant by a wife, in an agreement for separation, to release all claim to her husband's estate, upon his death, in consideration of a present conveyance to her of property by him, is not invalid because her interest in his estate is a mere expectancy; but, on the contrary, is valid and enforceable against the wife, upon the husband's full execution of the agreement: *Daniels v. Benedict*, 97 Fed. 367. In England, where a wife in a separation deed covenanted to release, when discovert, a reversionary life interest in real and personal estate, it was held that, on the husband's death, the wife was not bound to release her life interest, by having received an annuity under the deed, which was executed in 1875,

and was not acknowledged by her: *Harle v. Jarman* (1895), 2 Ch. 419.

When a husband, in a valid separation agreement, releases his wife and her estate from any claim or interest he has, or may have therein by reason of the marital relation, such release effectually bars him from any share or interest in property or estate left by her at death: *King v. Mollohan*, 61 Kan. 683, 60 Pac. 731. But an agreement between a husband and wife entered into pending a suit for divorce, and for the disposition of their property, by which each is to receive a specific sum from their homestead and one-half of the net proceeds of their personal property, and is released from all obligations of every character for the future acts and debts of the other, does not affect his right to share in her estate upon her death intestate, as there is no release by either one upon the estate of the other in case of death: *Jones v. Lamont*, 118 Cal. 499, 62 Am. St. Rep. 251, 50 Pac. 766, and see *Willis v. Jones*, 42 Md. 422; though it would be otherwise if the agreement contained apt words importing an intention for the one never to assert, in any way, any right to the property of the other, present or future: *In re Davis*, 106 Cal. 453, 39 Pac. 756. In this case, a husband and his wife had separated in pursuance of written articles of separation, whereby they agreed to divide their property, and relinquish all claims of every nature upon the property of each other then owned or thereafter to be acquired, and it was held that the surviving wife, living apart from her husband, at the time of his death, in pursuance of the arrangement, was not entitled to succeed to any portion of his estate: *In re Davis*, 106 Cal. 453, 39 Pac. 756.

The wife is entitled to the provision secured to her in valid articles of separation, and may also take under the provision of a will made in her favor by her husband: *Carson v. Murray*, 3 Paige, 483. The property received by her from her husband under an agreement for separation is not a part of the latter's estate, upon his death, and cannot be charged by his administrator with the payment of funeral expenses and other charges: *Appeal of Agnew* (Pa. Jan., 1888), 12 Atl. 160. Where the property becomes vested in a trustee, to be enjoyed by the wife with a power of appointment by will, and she afterward dies, the husband cannot set the articles aside, where no creditors intervene: *Heyer v. Burger*, 1 Hoff. Ch. 1. If the husband and wife have made an agreement of separation, and live apart until the husband dies, but no provision has been made for his wife prior to his death, the trustee who has made advances to her may bring an action to enforce a mortgage given to secure the performance of the husband's agreement: *Mann v. Hulbert*, 38 Hun, 27. A widow in Michigan is entitled to a distributive share of her husband's personal estate, although she has entered into a separation agreement in another

state, waiving her claims, under the law of the latter state, as widow, in case she survived her husband, unless it is shown that she has waived her rights under the laws of Michigan: *Knapp v. Knapp*, 95 Mich. 474, 55 N. W. 353.

Effect of Statutes.—In California, Colorado, Minnesota, and South Dakota, and possibly other states, a husband and wife may make a separation contract, under the statute, directly between themselves, and the intervention of a trustee is unnecessary: *Wickersham v. Comerford*, 96 Cal. 433, 31 Pac. 358; *Daniels v. Benedict*, 97 Fed. 367; *Roll v. Roll*, 51 Minn. 353, 53 N. W. 716; *Aspey v. Barry*, 13 S. Dak. 220, 83 N. W. 91. Such a contract is valid and may be enforced against the husband by action: *Roll v. Roll*, 51 Minn. 353, 53 S. W. 716. If the parties agree upon a division of the community property, each relinquishing all right to the share allotted and assigned to the other, and the wife agrees that, as to the sum allotted to her husband, it shall be his separate estate, and that, as to it, she "relinquishes all right as to his wife, in law or equity, or by descent, and each party shall have hereafter no claim upon the other for support or sustenance," the contract is binding upon the parties, and its effect is to deprive the wife thereafter of the right to select a homestead out of the separate property of her husband, either before or after his death: *Wickersham v. Comerford*, 96 Cal. 433, 31 Pac. 358. Until avoided by the mutual resumption of marital duties, or the divorce of the parties, a contract of separation, under the Civil Code of California, remains binding and obligatory upon the parties thereto, but, under that code, consent to a separation is a revocable act, and, if one of the parties afterward, in good faith, seeks a reconciliation and restoration, but the other refuses, such refusal is "desertion," for the purposes of a divorce, but if no divorce is obtained, the contract of separation still subsists: *Sargent v. Sargent*, 106 Cal. 541, 39 Pac. 931. The statute of New York provides that a married woman "may contract with her husband or any other person to the same extent, with like effect, and in the same form as if unmarried"; but it further provides that "nothing herein contained shall be construed to authorize the husband and wife to enter into any contract by which the marriage relation shall be altered or dissolved"; and it has been held that this statute does not authorize a contract between a husband and wife, made after they have separated, whereby the husband agrees to pay his wife an allowance in consideration of her living separate from him, and that such a contract will not be enforced, unless made with a trustee for the wife: *Poillon v. Poillon*, 49 App. Div. 341; 63 N. Y. Supp. 301; *Whitney v. Whitney*, 4 App. Div. 598; 36 N. Y. Supp. 891; 15 Misc. Rep. 72; 39 N. Y. Supp. 1136.

Actions on Separation Agreements.—A husband's stipulation to allow a separate maintenance to his wife, through the instrumental-

ity of a third person, as auxiliary to an agreement for a separation, may be enforced at law or in equity: *Helms v. Franciscus*, 2 Bland, 544, 20 Am. Dec. 402; *Grimé v. Borden*, 166 Mass. 198, 44 N. E. 216; *Calkins v. Long*, 22 Barb. 97. That a valid separation agreement between a husband and wife may be enforced in a court of equity, respecting the provision made for the wife, see *Walker v. Walker*, 9 Wall. 743, 751; *Wilson v. Wilson*, 5 H. L. Cas. 40; *Walker v. Beal*, 3 Cliff. 155, Fed. Cas. No. 17,065; *Smith v. Knowles*, 2 Grant Cas. 413; *Barnes v. Barnes*, 104 N. C. 613, 10 S. E. 304; *Aspinwall v. Aspinwall*, 49 N. J. Eq. 302, 24 Atl. 926; and a court, either of equity or of law, will enforce a legal and proper covenant in a separation deed, although other covenants in it may be illegal: *Hamilton v. Hector*, L. R. 13 Eq. 511; *Grime v. Borden*, 166 Mass. 198, 44 N. E. 216. But a contract for separation cannot be sustained in equity unless it was fair, just, and reasonable: *Switzer v. Switzer*, 26 Gratt. 574. A contract between a husband and wife, good at law, when made by a husband with a trustee for the wife, will be upheld in equity: *Evans v. Evans*, 93 Ky. 510, 514, 20 S. W. 605. A court of equity may enforce stipulations, in a separation agreement, respecting an arrangement of property and forbearance from personal molestation: *Wilson v. Wilson*, 5 H. L. Cas. 40. If a husband and wife, residents of Florida, temporarily residing in Maine, enter into a contract in the latter state, for their separation, and that he will pay her a monthly allowance for her support, such contract will be enforced in Maine, though not valid under the laws of Florida: *Carey v. Mackey*, 82 Me. 516, 17 Am. St. Rep. 500, 20 Atl. 84.

If a husband and wife contract with each other as if unmarried, a court of equity inquires whether the contract was fair and just, and equitably ought to be enforced, and administers relief where both the contract and circumstances require it; but it does not entertain jurisdiction to enforce mere voluntary agreements not founded upon any valuable consideration, either in favor of the wife against the husband, or in his favor against the wife. If, however, they are fair and just, and have been consummated, a court of equity will uphold the transactions, except as against creditors: *Hendricks v. Isaacs*, 117 N. Y. 411, 15 Am. St. Rep. 524, 22 N. E. 1029. The execution or fulfillment of a separation agreement solves all doubtful questions: *Emery v. Neighbor*, 7 N. J. L. 142, 11 Am. Dec. 543; and the law will not, at the instance of either party, relieve him from the effect of an illegal provision therein, so far as it has been executed: *Tallinger v. Mandeville*, 113 N. Y. 427, 21 N. E. 125. Equity has jurisdiction to rectify a mistake in a deed of separation and settlement: *Parham v. Parham*, 6 Humph. 286. A trustee may enforce the husband's covenant in a separation deed for the benefit of the wife: *Grime v. Bor-*

den, 166 Mass. 198, 44 N. E. 216; and a deed of separation cannot be annulled in an action to which the trustee is not a party: Galusha v. Galusha, 138 N. Y. 272, 33 N. E. 1062. A husband cannot restrain a suit to recover arrears of payment under a deed of separation: Holbrook v. Comstock, 16 Gray, 109; and equity will not entertain a bill to instruct trustees, under a deed of separation, how to act, where the trust has not terminated, and there is no ambiguity in its terms, or allegation of conflicting claims: Crawford v. Winston, 34 App. Div. 457; 54 N. Y. Supp. 246. Nor will equity compel a husband to convey to his wife's grantee, to perfect the legal title to land, where the agreement for separation is incomplete or invalid: Lippy v. Masonheimer, 9 Md. 310. A separation agreement will be canceled where the parties have subsequently cohabited together as man and wife: Smith v. King, 107 N. C. 273, 12 S. E. 57; but will not be set aside on account of the subsequent adultery or other misconduct of the wife, while living apart from her husband: Dixon v. Dixon, 23 N. J. Eq. 316; 24 N. J. Eq. 133; Lister v. Lister, 35 N. J. Eq. 49; Bradley v. Bradley, L. R. 7 P. D. 237; even where a divorce has been granted, and the covenant is to pay an annuity for life, if there are no express words limiting the husband's obligation to the period during which the marriage tie subsisted: Charlesworth v. Holt, L. R. 9 Ex. 38.

In England, the courts have gone so far as to decree specific performance of an agreement between a husband and wife to live separate and apart from each other: Hart v. Hart, 18 Ch. Div. 670; Besant v. Wood, 12 Ch. Div. 605; Gibbs v. Harding, L. R. 5 Ch. App. 336; Wilson v. Wilson, 1 H. L. Cas. 538; 5 H. L. Cas. 40; Seeling v. Crawley, 2 Vern. 386; Elworthy v. Bird, 2 Sim. & S. 372; without inquiring into the cause of the separation: Wilson v. Wilson, 1 H. L. Cas. 538; and the court will not refuse specific performance of such an agreement on the ground that it provides for the wife's having the custody of the children: Hart v. Hart, 18 Ch. Div. 670. It seems, too, that after decreeing specific performance of articles of separation, the court may restrain the wife, as well as the husband, from proceeding in a suit to annul the marriage: Wilson v. Wilson, 1 H. L. Cas. 538; and an injunction may be granted to restrain the wife from suing for a restitution of conjugal rights, by reason of her husband's trifling breaches of covenants contained in a deed of separation: Besant v. Wood, 12 Ch. Div. 605; and see Wilson v. Wilson, 5 H. L. Cas. 40.

In the United States, a court of equity will never decree a separation between a husband and wife, although they may have stipulated for it in a formal and solemn instrument. It will control the incidents and accomplish the lawful objects of a deed of separation between them, but it will not decree a separation:

Smith v. Knowles, 2 Grant Cas. 413; McKennan v. Phillips, 6 Whart. 571, 37 Am. Dec. 438; Aspinwall v. Aspinwall, 49 N. J. Eq. 302, 24 Atl. 926; Thomas v. Brown, 10 Ohio St. 247; Carter v. Carter, 14 Smedes & M. 59. It may be specifically enforced as to the property included within it: Thomas v. Brown, 10 Ohio St. 247; and see Marlow v. Marlow, 77 Ill. 633. Contra, Carter v. Carter, 14 Smedes & M. 59.

A separation agreement obtained from the wife by the husband's duress, imposition, or fraud may be set aside in equity: Willetts v. Willetts, 104 Ill. 122; Daniels v. Daniels, 9 Colo. 133, 150, 10 Pac. 657; or the wife may, where the provision for her support was inadequate, and the agreement was executed by her unadvisedly or imprudently, as a result of her husband's prior ill-treatment, be permitted to rescind the agreement upon restoring to the husband so much of the consideration as she has not already expended: Hungerford v. Hungerford, 161 N. Y. 550, 56 N. E. 117. But where no fraud, coercion or concealment in procuring articles of separation is shown, a wife will not be permitted, upon the death of her husband to claim any portion of his estate: Daniels v. Benedict, 97 Fed. 367; especially after the lapse of twenty-six years from the date of the separation: Frank's Estate, 195 Pa. St. 26, 45 Atl. 489; and see Schmoltz v. Schmoltz, 116 Mich. 692, 75 N. W. 135, showing that a wife cannot ratify a written agreement of separation, and at the same time assert a parol agreement of that kind, giving her a larger amount of property. Courts will not undo the accepted execution of an agreement of separation by the parties, done in good faith: Daniels v. Benedict, 97 Fed. 367; and the wife cannot sue to annul it, if the husband is free of fraud or fault: Sparks v. Sparks, 94 N. C. 527. The agreement will be enforced in equity, if either party has received the benefit of it: Bowers v. Hutchinson, 67 Ark. 15, 53 S. W. 399.

Although the trustee has not signed articles of separation if the wife has lived separate and apart from her husband upon the faith of the agreement, and made a testamentary disposition of the personal property included therein, her administrator may recover it from the trustee notwithstanding the husband's objections: Emery v. Neighbor, 7 N. J. L. 142, 11 Am. Dec. 541; and a husband, who has given his secured promissory notes, upon a separation agreement, for the support of his wife and daughter, but who has fraudulently obtained possession of them, by pretending that he would again live with his wife, may be compelled by a court of equity to pay them: Marlow v. Marlow, 77 Ill. 633. As a valid contract of separation binds the wife, she cannot, in an action for the alienation of her husband's affections, recover damages for the loss of her husband's support,

as against one who caused the separation: *Metcalf v. Tiffany*, 106 Mich. 504, 64 N. W. 479. The amount allowed a wife in a deed of separation is, so long as the deed remains unrevoked, the wife's measure of damages in an action by her to set aside the agreement, to open a decree of divorce in a former action between the plaintiff and her husband, and to modify it by increasing the allowance for alimony to the plaintiff therein: *Galusha v. Galusha*, 138 N. Y. 272, 33 N. E. 1062. A husband, in arrears as to payment of installments, under a deed of separation, and against whom a judgment has been rendered, cannot, after proceedings have been going on for five months, have them set aside by a tender of the full amount of the unpaid installments: *Biery v. Steckel*, 194 Pa. St. 445, 45 Atl. 376.

In *Miller v. Miller*, 13 Ohio St. 528, it is held that a separation agreement can be made available, in pleading, as a full defense to an action by the wife for a distributive share of her deceased husband's estate, only when accompanied by such averments as show it to have been fair, reasonable and just to her; and that the same is true where the contract is relied on as a cause of action; but other cases hold that such a contract is presumptively valid and that a party pleading it either as a cause of action or matter of defense need not aver or prove that it was fair and just to the wife: *Daniels v. Benedict*, 97 Fed. 367; *Commonwealth v. Richards*, 131 Pa. St. 209, 18 Atl. 1007. In a suit in equity brought by a wife against her husband to enforce a mutual agreement of separation between them, providing for payments of money by him for her separate support, founded upon a valuable consideration passing from her to him, the rules of evidence as applied in a court of law may be applied, and a defense which would be overruled at law may be overruled in such a case in equity: *Buttlar v. Buttlar*, 57 N. J. Eq. 645, 73 Am. St. Rep. 648, 42 Atl. 755. In an action brought to recover certain sums alleged to be due under a separation agreement, the question as to whether or not the agreement has been violated is one for the jury where the evidence is in conflict: *Duryea v. Bliven*, 122 N. Y. 567, 25 N. E. 908.

SHEPPARD v. ROSENKRANS.

[109 Wis. 58, 85 N. W. 199.]

LANDLORD AND TENANT—LEASE, WITH PRIVILEGE OF EXTENSION—CONSTRUCTION OF.—A lease for a term stated, with the privilege of an extension by giving notice before the original term expires, is an unconditional lease for the original term and a conditional lease for the term thereafter.

LANDLORD AND TENANT—LEASE, WITH PRIVILEGE OF EXTENSION—HOW LESSEE HOLDS.—If a lessee, under his lease, has the privilege of an extension, and holds over upon giving notice as therein required, he holds for the additional term under the original lease and not under the notice.

LANDLORD AND TENANT—LEASE—NOTICE FOR AN ADDITIONAL TERM—STATUTE OF FRAUDS.—The act of a lessee in giving notice that he will hold for an additional term, according to the privilege of his lease, is not the making of an agreement concerning land. It is not, therefore, within the statute of frauds, concerning that subject, and may be given by an agent having no written authority.

NOTICE NOT SEASONABLY GIVEN, BUT ACTED UPON WITHOUT OBJECTION, IS A WAIVER of the condition as to the time in which it should have been given.

INSTRUCTIONS—LEGAL EFFECT OF ANSWER—SPECIAL VERDICT.—It is error to state to a jury the legal effect of their answer to a question in the special verdict.

INSTRUCTIONS—EXCEPTION TO—WHEN INSUFFICIENT.—An omnibus exception which includes two or more distinct propositions, some of which are correct, is insufficient to present the question as to the correctness of any one of the propositions singly.

Action to recover certain installments of rent under a written lease, entered into between Jacob Weil, and the defendant, Rosenkrans, whereby a certain room of a building in Chicago was leased to Rosenkrans from October 1, 1894, to April 30, 1896, "with the privilege of four years more," at a specified rate, by giving ninety days' notice before May 1, 1896. Rosenkrans took possession, and did a jewelry business, but on March 1, 1896, the Weber Jewelry Company succeeded to Rosenkrans' business, and occupied the premises until August 1, 1897, paying the rent therefor. On March 3, 1896, J. H. Weber, a member of the company, and in which company Rosenkrans seemed to have been largely interested, delivered to the agent of the then owner of the demised premises a notice that he, the defendant, Rosenkrans, would continue in possession of the premises under the stipulations of the lease. This notice was signed, "O. L. Rosenkrans by J. H. Weber." Weber testi-

fied that he gave the notice by direction and authority of Rosenkrans, who denied that he had given any such authority, but it was found that the defendant served, or caused the notice to be served. On May 28, 1897, Weil assigned the lease, with the rent thereby secured, to the plaintiff, Sheppard, by an indorsement in writing. Weil died December 17, 1897. It was found that the defendant vacated the premises on July 31, 1897, and that the plaintiff obtained a new tenant therefor on May 1, 1898, but at a lower rent, though for the best price obtainable. The premises were vacant for nine months. Upon the interrogatory 7½, the jury found that, after the alleged renewal of the lease, down to the time when the premises were vacated, the defendant occupied the premises under the lease. The plaintiff obtained a judgment for damages and the defendant appealed.

Blatchley & Burke and A. H. Blatchley, for the appellant.

O'Connor, Hammel & Schmitz and Leopold Hammel, for the respondent.

62 WINSLOW, J. The lease in question was an Illinois contract, and the appellant's main contentions are based upon the provisions of that part of the statute of frauds of Illinois relating to contracts concerning lands or interests therein which reads as follows: "No action shall be brought to charge any person upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized in writing signed by such party": Starr and Curtis' Annotated Statutes 1896, c. 59, sec. 2.

The appellant's argument is that the occupation of the premises after April 30, 1896, must be a holding under the notice of election to hold for the additional term, and that such notice having been given by an agent whose authority, if any, was not in writing signed by Rosenkrans, it follows that the notice was inadmissible in evidence, and ineffective even if admitted. The conclusive answer to this contention, **63** as well as to the minor contentions founded on the statute referred to, is that, if the option provided for in the lease was exercised, the lease became a lease for both the original and the extended terms, and hence the holding was under the original lease and not under the notice. As said in 1 McAdam on Landlord and Tenant, third edition, 160: "A lease for one year, or three additional

years if the lessee elect, is of itself a lease for four years if the lessee elect to continue it beyond the first year. This is so because, if the tenant makes the election, he still holds under the original demise; there is no further act to be done by the lessor."

The stipulation was not to "renew" or "extend" the lease, which stipulation would require the making of a new lease (*Kollock v. Scribner*, 98 Wis. 104, 73 N. W. 776), but it was a stipulation that by the giving of a certain notice the lease itself should cover an additional four years. It was an unconditional lease for the period expiring April 30, 1896, and a conditional lease for four years thereafter. The condition was the giving of a certain notice by the lessee, but it might just as well have been the happening of an event over which neither party had control, such as the death of a person or the falling of a tree. When such required event happened, the condition was satisfied, and the lease became a lease for the additional period by its own terms. The act of the lessee in giving the notice was not the making of an agreement, but the performance of a condition upon which the previously made agreement depended. So the statute referred to does not apply to the notice of the exercise of the option or privilege, and the authority of the agent to make it is not required to be in writing.

But it is said that the notice was not given ninety days before the thirtieth day of April, 1896, and hence that the condition never was in fact performed. This objection, however, is met by the fact that the notice was given and accepted without objection on the score of time. There are ⁰⁴ few cases where the time within which an act is required to be done may not be waived by the parties where the rights of others are not affected, and the facts in the present case show an undoubted waiver by acceptance and action upon the notice without objection.

An exception to a portion of the charge requires notice. In charging the jury upon interrogatory 7½, the trial judge gave an instruction covering nearly a page and a half of the printed case. The first part of the instruction, nearly a page in length, was substantially a correct statement of the considerations which the jury might take into account in answering the question. Then followed, however, this clause: "Although it is not my duty to tell you the effect of your answer, I may state that, if you answer that it was occupied by the Weber Jewelry Company under an arrangement or bargain made with Mr. Weil, it will relieve Mr. Rosenkrans of any liability, because the occupation which continued after the renewal of this lease was all

paid for." The defendant excepted to the entire instruction. The court undoubtedly committed error in stating to the jury the legal effect of their answer to the question upon the rights of the parties, under numerous recent decisions of this court; and, had exception been taken specifically to this part of the charge, we should feel obliged to reverse the case. The rule is familiar, however, that an omnibus exception which includes two or more distinct propositions, some of which are correct, is insufficient to present the question as to the correctness of any one of the propositions singly, and under this rule we cannot consider the exception.

Other minor errors are assigned, but we find no merit in them, and they do not require specific treatment.

By the Court. Judgment affirmed.

LEASE—PRIVILEGE OF RENEWAL.—A COVENANT in a lease that the tenant shall have the privilege of renewal after the expiration of his term is equivalent to a covenant that the term shall be extended without the necessity of a new or further lease: Note to *Ranlet v. Cook*, 84 Am. Dec. 97. See, also, *Delashman v. Berry*, 20 Mich. 292, 4 Am. Rep. 392; note to *Blumenberg v. Myres*, 91 Am. Dec. 565. A lease is extended for the period of time specified, by the tenants complying with the conditions named, where it contains a provision that at its expiration it shall be renewed upon certain terms: *Ranlet v. Cook*, 44 N. H. 512, 84 Am. Dec. 92.

GUHL v. WHITCOMB.

[109 Wis. 69, 85 N. W. 142.]

RAILROADS—DUTY TO LOOK AND LISTEN.—The known presence of a railway track is itself notice of the momentary peril of a passing train at all times, and the duty to look and listen is not relaxed by any opportunity for theorizing, or difference of opinion, as to whether a train is or is not likely to pass.

RAILROADS.—THE DUTY TO LOOK AND LISTEN IS ABSOLUTE, where the opportunity exists, and no "diversion of attention" will excuse an omission to do so, except in cases where the attention is so irresistibly forced to something else as to deprive the traveler of the opportunity to perform that duty.

RAILROADS—NEGLIGENCE IN OMITTING TO LOOK FOR TRAIN—WHAT IS.—If a girl between nineteen and twenty years of age comes up to the crossing of a north and south highway with a railroad, which runs so nearly north and south that the angle of crossing is only sixteen degrees, and looks to the northward, where she observes a freight train more than a third

of a mile away, and needlessly steps on the track, looking continuously to the northward but without looking, or having looked, when near the track, to the southward, where she would have a clear view for a long distance, when she is struck and injured by a passenger train running northward at a high rate of speed, it must be held that she was negligent in omitting to look for a train from the south.

EVIDENCE — PHOTOGRAPHS — PRIVATE PARTS OF HUMAN BEINGS.—IT IS GROSSLY IMPROPER, upon the trial of an action for personal injuries, brought by a young lady between nineteen and twenty years of age, to admit in evidence photographs showing rear views of the plaintiff's person, nude from below the shoulders to mid-thigh. If the condition of any private part of the body of any party, male or female, is material on any trial, it should be privately examined by experts out of court, and expert testimony be given of it.

Action against Whitcomb and another for personal injuries received by the plaintiff, under circumstances stated in the third section of syllabus, *supra*. The girl heard the rumble of a train, which she took to be the freight train to the northward, and there was evidence of failure on the part of the defendants' employes to give the requisite signals by whistle or bell. Among other things, the jury were instructed: "The duty of a traveler before crossing a railway to look both ways and listen, depends upon the conditions that he might reasonably expect the coming of a train at any and all times, and that his attention is not reasonably arrested or diverted"; also, that they had to determine whether it was "ordinary care and prudence on the part of the plaintiff to fail to look to the south and see this train approaching, when her attention was taken up by watching the train which was coming from the north." There was a judgment for the plaintiff and the defendants appealed.

Howard Morris, Thomas H. Gill, and Charles M. Morris, for the appellants.

Earl P. Finch and Fred Beglinger, for the respondent.

⁷¹ DODGE, J. The two principal errors assigned consist in the denial of motion to direct a verdict on the ground of plaintiff's contributory negligence, and in the giving as a rule of law to the jury the sentence quoted in the statement of facts, together with some other instructions further developing the same idea. That sentence is adopted from the opinion in *Ward v. Chicago etc. Ry. Co.*, 85 Wis. 601, 604, 55 N. W. 771, and, unless later decisions of this court have modified ⁷² that case, the instruction assailed is not unsupported by authority. A review of the subsequent cases, therefore, becomes necessary.

It will be observed that the instruction under consideration exempts a traveler from the absolute duty to look and listen in the absence of either of two conditions: 1. That the situation is such that he may reasonably expect the coming of a train at any and all times; and 2. That his attention is not reasonably arrested or diverted. The first of these exceptions to the rule of duty to look and listen, namely, that the situation must be such that one may reasonably expect a train to pass, was repudiated within a year after the decision of the Ward case in *McKinney v. Chicago etc. Ry. Co.*, 87 Wis. 284, 58 N. W. 386, under circumstances more strongly inviting its recognition. In the Ward case the exception was predicated on the fact that a train had just passed and plaintiff failed to look and see a loose car following it. In the McKinney case two trains had passed, and plaintiff failed to look and see a third, following more closely than customary and than permitted by rules of the company. Under those circumstances it was said, "The track itself is a danger signal." In his dissenting opinion Mr. Justice Winslow pointed out that the decision in substance overruled the Ward case. Again, in *Schlingen v. Chicago etc. Ry. Co.*, 90 Wis. 186, 193, 62 N. W. 1045, 1047, was excluded the possibility of legitimate inference that under any circumstances a railway track is safe, the court saying: "A railroad track is, in effect, a standing proclamation to those approaching it that cars are liable to run thereon at any time." In *Nolan v. Milwaukee etc. Ry. Co.*, 91 Wis. 16, 26, 64 N. W. 319, 322, the above language was quoted and applied where plaintiff had observed that the train, headed west, which injured him, was stationary, at the depot, two hundred feet away, engaged in loading freight, and his attention was engaged in looking for a train due from the west.

In *McCadden v. Abbot*, 92 Wis. 551, 66 N. W. 694, plaintiff, a fireman, ⁷³ observing the engine which injured him stationary, taking on coal, went a short distance and crossed the track without looking, and was run down because the engine traveled fifteen miles per hour, whereas if it had pursued the custom, known to plaintiff, of traveling only six miles per hour in that part of the yard, he would have been in no peril. In this situation it was reiterated that the track was a standing proclamation of danger, and that failure to look by one having the opportunity was of itself contributory negligence and precluded recovery. There was cited with approval *Nixon v. Chicago etc. Ry. Co.*, 84 Iowa, 331, 51 N. W. 157, to the effect that knowl-

edge of a custom to run trains in only one direction on the particular track was no excuse for failure to look both ways. In *White v. Chicago etc. Ry. Co.*, 102 Wis. 489, 78 N. W. 585, it was held that absence of usual warning by gates was no excuse to a foot passenger for omission to look, when he had the opportunity, before stepping on the track.

From these later decisions we think it should have been apparent to the trial court that the somewhat obiter remark in the *Ward* case that the duty of one to look and listen "depends on the condition that he might reasonably expect the coming of a train at any and all times" is entirely abrogated. In nearly all of the cases above quoted the *Ward* case was urged upon the attention of the court. It is, perhaps, unfortunate that it was not mentioned by name in some of the opinions and the implied repudiation of some of its doctrine made explicit. However, in view of the cases above mentioned, it cannot be doubted that the rule of this court, now settled too firmly to permit question, is that the known presence of a railway track is itself notice of the momentary peril of a passing train at all times, and the duty to look and listen is not relaxed by any opportunity for theorizing or difference of opinion as to whether a train is or is not likely to pass. Observation, not logic, is the proper precaution.

⁷⁴ The instruction of the court—adopted, as we have said, from the *Ward* case—that, if a traveler's attention is "reasonably arrested or diverted," his duty to look and listen is abrogated, involves a misleading use of terms. "Diversion of attention" had long before been adopted to express conditions under which the watchfulness of one traveling on a sidewalk might be relaxed, consistently with ordinary care. The expression had thus acquired a meaning in the law which obviously renders it inapplicable to the duty of vigilance resting on one about to cross a railway track, which is not, like a city sidewalk, an assurance of probable safety, but, on the contrary, a proclamation of peril. The expression was used (casually, it is true) in *Piper v. Chicago etc. Ry. Co.*, 77 Wis. 247, 46 N. W. 165, but there it was applied to a situation where the plaintiff's attention was irresistibly withdrawn from an approaching train by attempted runaway of his team. The expression having again been used in the *Ward* case, and both cases being pressed on this court in *Schneider v. Chicago etc. Ry. Co.*, 99 Wis. 386, 75 N. W. 169, the present chief justice took occasion to point out that in his use of terms in the *Piper* case he applied the expression to an absolute forcing away of the attention. That

term was again used to express the situation which might excuse momentary relaxation of watchfulness in *Koester v. Chicago etc. Ry. Co.*, 106 Wis. 460, 469, 82 N. W. 295, 298. In numerous other cases circumstances which might well satisfy the expression "diversion of attention" have been held insufficient to excuse a failure to continually look and listen: *Lofdahl v. Minneapolis etc. Ry. Co.*, 88 Wis. 421, 60 N. W. 795; *McKinney v. Chicago etc. Ry. Co.*, 87 Wis. 284, 58 N. W. 386; *Schlimgen v. Chicago etc. Ry. Co.*, 90 Wis. 186, 62 N. W. 1045; *Nolan v. Milwaukee etc. Ry. Co.*, 91 Wis. 16, 64 N. W. 319; *McCadden v. Abbot*, 92 Wis. 551, 66 N. W. 694; *White v. Chicago etc. Ry. Co.*, 102 Wis. 489, 78 N. W. 585; *Cawley v. La Crosse City Ry. Co.*, 101 Wis. 145, 77 N. W. 179; *Ryan v. La Crosse City Ry. Co.*, 108 Wis. 122, 83 N. W. 770; *Wills v. Ashland etc. Ry. Co.*, 108 Wis. 255, 84 N. W. 998.

⁷⁵ The rule stated in these decisions is that the duty to look and listen is absolute where the opportunity exists. In most of these cases the exception in favor of reasonable diversion of attention was urged, and its applicability was apparent if those words be used in the sense now contended for by respondent. It is considered, therefore, that all exception to the duty to look and listen at a railroad crossing resulting from diversion of attention has been repudiated by this court except in cases where the attention is so irresistibly forced to something else as to deprive the traveler of the opportunity to perform that duty. This rule is general, and applies as well to the driver of a team as to the foot passenger, with the difference, however, that it is much more difficult to conceive circumstances surrounding the latter which can at once deprive him of the opportunity to observe and the ability to stop short of the actual peril. With him a single step, wholly under his control, crosses the danger line. With the driver, many things may complicate the situation—momentum, conduct of horses, multiplication of perils, and the like.

In the record before us there is nothing to excuse the conceded omission, while walking a distance of at least fifty feet, to look along the unobscured track to the southward. During most of that distance observation to the north was futile and needless. Plaintiff could not see the train in that direction, and she was in no peril from it till she reached the track. When she did come to a point when the freight train was in sight, she was still ten or fifteen feet from the track, and the train, moving, as she thought, very slowly, was more than a third of a mile away. It certainly offered no attraction and

threatened no peril to preclude her from a glance in the opposite direction. Even had it been so close as to imperil her, nothing prevented her from pausing to give that glance before incurring the other danger, which the existence of the track warned her was imminent and ⁷⁶ momentary. The suggestion that the sight of the freight train was an assurance against a train from the south is not of weight. If, as she testifies, she could not see, and did not know of, a sidetrack, she had no right in reason to infer the nonexistence of any. Indeed, the fact that the freight train was substantially stationary at a place remote from the station would suggest a passing point, if she reasoned at all on the subject. These considerations are, however, beside the issue. No process of reasoning could justify her in needlessly stepping onto the track without assuring herself by observation that no train approached from either direction.

We cannot, without violation of settled rules of law, either approve the instruction given to the jury, or recognize any of the circumstances surrounding plaintiff as sufficient to justify the inference or conclusion that she was not negligent in omitting to look for a train from the south, for which precaution she had ample opportunity. Both of the assignments of error are well taken.

2. We cannot pass silently the reception in evidence of photographs showing rear views of plaintiff's person, nude from below the shoulders to mid-thigh. Such photographic exposure of the body of a twenty year old girl in a courtroom full of men is even more grossly improper and shocking than the conduct disclosed in *Brown v. Swineford*, 44 Wis. 282, 285, 28 Am. Rep. 582, of which this court expressed its condemnation in the scathing words of Chief Justice Ryan: "No such indecency is ever necessary, or should be tolerated, in court. If the condition of any private part of the body of any party, male or female, is material on any trial, it should be privately examined by experts out of court, and expert testimony be given of it. Such an exposure as was made in this case, if made without leave of the court, might well be punished as a contempt; made with the sanction of the court, it is none the less improper and indecent, well calculated to disgrace the administration of justice, and to bring ⁷⁷ it into ridicule, if not into contempt. It is hoped that this court may never have another occasion for such censure." To those words we cannot and need not add, save to reiterate the sentiments they express, and to invoke for them the careful attention of those, whether of court or

bar, who may be tempted to repeat such defilement of the proceedings in a court of justice.

By the Court. Judgment reversed, and cause remanded for a new trial.

RAILROAD CROSSING.—A TRAVELER MUST LOOK and listen before going upon a railroad track, although it is not the hour when a regular train is expected: *Hinkle v. Richmond etc. R. R. Co.*, 109 N. C. 472, 26 Am. St. Rep. 581, 13 S. E. 884. The rule that a man, before crossing a track, must stop, look, and listen, is not a rule of evidence, but of law, peremptory, absolute, and unbending: *Aiken v. Pennsylvania R. R. Co.*, 130 Pa. St. 380, 17 Am. St. Rep. 775, 18 Atl. 619. For applications of these principles where travelers are struck by trains coming from the opposite direction from which expected, see *Robertson v. Pennsylvania R. R. Co.*, 180 Pa. St. 43, 57 Am. St. Rep. 620, 36 Atl. 403; *Duame v. Chicago etc. Ry. Co.*, 72 Wis. 523, 7 Am. St. Rep. 879, 40 N. W. 394.

PHOTOGRAPHS AS EVIDENCE in actions for personal injuries are discussed in the monographic note to *Baustian v. Young*, 75 Am. St. Rep. 473, 474. Consult, also, *Selleck v. Janesville*, 104 Wis. 570, 76 Am. St. Rep. 892, 80 N. W. 944.

McKENNA v. VAN BLARCOM.

[109 Wis. 271, 85 N. W. 322.]

RECORDS—SEARCH FOR JUDGMENT LIENS—DILIGENCE.—A person offering a mortgage for record is not required to examine all the records in the clerk's office for judgment liens. If the judgment docket shows a clear record he need not seek any further.

LIENS OF MORTGAGE AND OF JUDGMENT—PRIORITY.—If, when a mortgage is executed and recorded, no judgment against the mortgagor appears on the judgment docket, the lien of the mortgage is prior to that of an undocketed judgment then existing against the mortgagor, though it had been filed with the clerk of the court and some entries concerning it had been made in the court records.

LIENS OF JUDGMENT—TACKING OF—DEFEAT OF MORTGAGE LIEN.—If a judgment creditor, several months after the expiration of the lien of his judgment, obtains and docketts a new judgment, he cannot tack the two liens and thus make a continuous one which will have priority over the lien of a mortgage, which existed between the expiration of the old judgment lien and the inception of the new one.

ATTORNEYS AT LAW—PURCHASE BY, OF MORTGAGE.—A person is not disqualified, because of his being an attorney at law, from purchasing a mortgage with the intention of foreclosing it, if not paid, where no violation of duty is disclosed.

Action to foreclose a mortgage executed by one Gibson to J. S. Rowell, Sons & Co., dated December 31, 1878, and which had been assigned to the plaintiff, an attorney at law. Gibson was dead, and this action was brought against his heirs, Van Blarcom, his administrator, and the Johnston Harvester Company, which claimed a prior judgment lien. There was a judgment of foreclosure and sale, and the contesting defendants appealed.

Duffy & McCrory and J. H. McCrory, for the appellants.

Edward S. Bragg, for the respondent.

272 BARDEEN, J. It developed from the evidence offered by the defendants that the Johnston Harvester Company obtained a judgment against the mortgagor, Gibson, in the county court of Fond du Lac county, on the nineteenth day of October, 1878. This judgment was not docketed in the office of the clerk of the circuit court until the twenty-first day of **273** February, 1879. In the meantime, and on December 31, 1878, Gibson executed the mortgage in suit to secure a bona fide debt to J. S. Rowell, Sons & Co. It also appears from the evidence that the county court judgment was filed in the office of the clerk of the circuit court, and some entries were made in the court records relating to the same, on October 19, 1878, but it was not docketed as the statute requires until the date above mentioned. It is argued by defendants that, if the mortgagee had made search of the records in the clerk's office, its representatives would have found the defendant's judgment; and if they knew of its rendition, or could have discovered it by diligent inquiry, the omission of the clerk to docket it will afford them no protection against the lien thereof subsequently perfected. Such is not the law. Sections 2899, 2902 of the Revised Statutes of 1878 provide for the docketing of judgments in a book especially prepared for that purpose, and that when so docketed they shall be liens upon the real property of the defendant, "for a period expiring ten years from the date of the rendition thereof." No statute requires a party seeking for judgment liens to examine all the records in the clerk's office, and no principle of law of which we are aware imposes any such diligence. If the judgment docket shows a clear record, the party need seek no further. When the mortgage in suit was executed and recorded, the judgment docket failed to disclose that the Johnston Harvester Company had a lien upon the property covered by it. Such being the fact, the mortgage

became the first lien, and must prevail over the lien sought to be set up by the defendants.

But, should the law be conceded to be as claimed by defendants, there is another reason why the lien of defendants' judgment must be postponed to that of the mortgage. The judgment was rendered on October 19, 1878. By section 2902 the lien thereof expired ten years from the date of rendition, or October 19, 1888. The fact that the judgment ²⁷⁴ creditor, after the expiration of such lien, sued upon said judgment and obtained a new one, which was afterward docketed, does not allow him to tack the two and thus make a continuous lien. There was a period of several months between the expiration of the old lien and the inception of the new one, during which any other lien upon the property would attach and become superior to the lien of the new judgment afterward acquired.

It is further urged that, as plaintiff is an attorney, he could not purchase the mortgage in suit and enforce it, and that he did not purchase in good faith and in the usual course of trade. Upon the question of good faith the evidence is all one way, and amply supports the trial court's conclusions in favor of plaintiff. The fact that George Gibson, one of the defendants, acted as plaintiff's agent in the purchase of the mortgage, is of no consequence. The reason he was sent to the mortgagee to open negotiations was that it was believed that he could obtain better terms than the plaintiff could. The plaintiff testified that he purchased the mortgage as a matter of business, and paid for it with his own money, without any understanding with others, and frankly stated that he intended to foreclose it if not paid. The assertion that he was disqualified from making such purchase because he was an attorney finds no support in the law of this state. It is only where questions of champerty or maintenance arise that such disqualification exists: *Miles v. Mutual etc. Assn.*, 108 Wis. 421, 84 N. W. 159. The only authority cited to support the defendants' contention is from New York, where they have an express statute on the subject: See *Browning v. Marvin*, 100 N. Y. 144, 2 N. E. 635. The disability of the attorney arises where some duty or obligation to his client is involved, and the courts are strict in enforcing a rigid adherence to such duty and a complete recognition of such obligations. The facts in this case fail to disclose any violation of duty or any such transaction as would bring it within the condemnation of the law.

By the Court. The judgment is affirmed.

JUDGMENT LIEN—RECORD.—It is held in *Johnson v. Schloesser*, 146 Ind. 509, 58 Am. St. Rep. 367, 45 N. E. 702, that the lien of a judgment on land is not lost by the failure of the clerk to enter the judgment on the judgment docket, although such real estate has passed into the hands of a bona fide purchaser without notice of the judgment; and in *Aetna Life Ins. Co. v. Hesser*, 77 Iowa, 381, 14 Am. St. Rep. 297, 42 N. W. 325, that a judgment, before it becomes a lien, must be of record in the books required by statute, and the record is not complete until an entry is made in the index.

WALLACE v. PERELES.

[109 Wis. 316, 85 N. W. 371.]

EVIDENCE—PRESUMPTION.—COVERTURE once shown is presumed to continue.

HUSBAND AND WIFE—CONVEYANCE BETWEEN—LEGAL TITLE.—Prior to the enactment of the Wisconsin statute, Laws of 1895, chapter 86, an absolute conveyance of real property from a husband directly to his wife did not carry the legal title, unless the property was purchased by the wife out of her separate estate.

HUSBAND AND WIFE—CONVEYANCE BETWEEN—BURDEN OF PROOF.—In a contest over land conveyed by a husband to his wife, she, or one taking from her with notice, must show by clear and satisfactory evidence that her purchase from her husband was made in good faith, and for a valuable consideration paid out of her separate estate, or by a third person for her. A mere recital of a valuable consideration in the conveyance will not support a recovery in her favor.

COVENANTS RUN ONLY with the legal title to lands and tenements.

COVENANTS ARE PERSONAL, WHEN.—The covenants of a grantor of land, if he has no title and no possession, and the grantee does not take immediate possession, are personal to the grantee, and are not transmitted to subsequent grantees by a mere conveyance of the land.

JUDGMENT AS EVIDENCE OF PARAMOUNT TITLE.—A judgment which establishes a paramount right to land as against one in possession is not prima facie evidence of the existence of a paramount title, or of eviction thereby, as against a defendant who had no notice of the action until after judgment was rendered.

Argus and wife deeded the west twenty-four feet of a certain lot, except the north ten feet thereof, to the defendant, Pereles, who, with his wife, conveyed, with full covenants of warranty, the entire west twenty-four feet of the lot to one Eckert. The latter then quitclaimed the last-described tract

to his wife. Mrs. Eckert conveyed with warranty to Henrietta Sager, and she to the plaintiff, Wallace, who in turn deeded to one Poppe. All of the deeds, subsequent to that made by Argus and wife, included the excepted strip of ten feet made in that deed, to which strip Pereles had no title and no possession. Afterward, at the suit of one Mrs. Patchin, Poppe was evicted from said north ten feet of the lot. Poppe then sued Wallace on the covenants of his deed, and served Pereles with written notice and a demand to defend. Pereles made no defense and a judgment for damages was entered against Wallace and in favor of Poppe. Wallace then sued Pereles to recover the amount of the Poppe judgment. This action was based on the covenants made by Pereles in the latter's deed to Eckert. It was found that the deed from Eckert to his wife was based upon "a valuable consideration, or other good and sufficient consideration." The defendant offered evidence that he was never in possession of the disputed ten feet, but the court refused to find on that subject. It also refused to find that the Eckerts were husband and wife, and that Mrs. Eckert did not pay the consideration for the deed to her out of her separate estate. The plaintiff obtained judgment and the defendant appealed.

Nath. Pereles & Sons and C. F. Hunter, for the appellant.

Guernsey & Lehr, Barbers & Beglinger, J. E. Lehr, and Fred. Beglinger, for the respondent.

319 BARDEEN, J. Questions of law only are involved on this appeal. They group themselves under the following heads: 1. The conveyance from Eckert to his wife passed only an equitable title. Covenants real run only with the legal title, and cannot be enforced by her grantees against defendant. 2. Neither title nor possession being shown in defendant at the time of his conveyance, the covenants in his deed were personal to his grantee, and did not pass by a mere conveyance of the land. 3. No eviction under paramount title having been shown, the recovery, if any, must be limited to nominal damages.

1. The evidence is undisputed that at the date of the deed from Frederick Eckert to Minnie Eckert the parties were husband and wife. Coverture once shown is presumed to continue: Jones on Evidence, sec. 54. Under the evidence the court **320** should have found that they were, and still are, man and wife. Prior to the passage of chapter 86 of the Laws of

1895, an absolute conveyance of real property from the husband directly to his wife did not carry the legal title, unless the property was purchased by the wife out of her separate estate: *Putnam v. Bicknell*, 18 Wis. 333; *Kinney v. Dexter*, 81 Wis. 80, 51 N. W. 82. Where, however, the transaction related to her separate estate, the marriage relation was disregarded, except where the question of fraud arose, and then it was considered and more closely scrutinized on account of the great inducements and facilities afforded for the commission of fraud: *Beard v. Dedolph*, 29 Wis. 136. See *Fenelon v. Hogoboom*, 31 Wis. 172. In *Kinney v. Dexter*, 81 Wis. 80, 51 N. W. 82, the action was ejectment. The plaintiff claimed title by successive deeds after a deed from one Brown to his wife.

The latter deed was a mere gift, and the court held that it gave the wife only an equitable title to the land, which would not support ejectment. In contests which have arisen involving transactions between husband and wife, a rule of great strictness has been adopted by this court as to the burden of proof. Where the rights of creditors are involved, before the wife can recover she must show by clear and satisfactory evidence that her purchase from her husband was made in good faith and for a valuable consideration paid out of her separate estate, or by a third person for her; and the same rule applies to one who took from the wife with notice. In such case a mere recital of a valuable consideration in the conveyance from husband to wife will not support a recovery in her favor: *Horton v. Dewey*, 53 Wis. 410, 10 N. W. 599; *Gettelmann v. Gitz*, 78 Wis. 439, 47 N. W. 660; *Rozek v. Redzinski*, 87 Wis. 525, 58 N. W. 262. In *Carpenter v. Tatro*, 36 Wis. 297, the suit was by the wife against her divorced husband upon a claim assigned to her by her second husband. She testified that she paid five dollars therefor, but did not show she had any separate estate. A ³²¹ judgment in her favor was reversed, and the court said: "If the plaintiff had no separate estate, the assignment and transfer of the debt by the husband to her does not vest the legal title in her. She could not receive it as a gift from him, as she might from any person other than her husband, and enforce its collection by action upon it. And until it appeared that she had a separate estate, with which she purchased the claim, the evidence of the assignment should have been excluded."

If Mrs. Eckert had been evicted, and had brought an action against defendant upon the covenants in the deed, she could not have prevailed in such action, under the authorities cited,

without showing that she purchased the property out of her separate estate. In what better position are her grantees? She obtained but an equitable title to the land. That title passed to her grantees, and no one is here questioning it. Her grantees, however, are seeking to give it the force and effect of a legal title, and insist that it can only be questioned by creditors of the husband, or others wronged by the conveyance. But that is not the real question at issue. No one is seeking to impeach the actual title conveyed. The real question is whether a right of action in plaintiff can be traced through a chain of conveyances, one of which conveys only an equitable estate. Under the facts and law as stated, the legal title stopped in Mr. Eckert. In *Wright v. Sperry*, 21 Wis. 331, 334, this court said: "It is a general principle that covenants run only with the legal title to lands and tenements: *Beardsley v. Knight*, 4 Vt. 471; *Randolph v. Kinney*, 3 Rand. 396; *Watson v. Blaine*, 12 Serg. & R. 131, 14 Am. Dec. 669; *Allen v. Woolley*, 1 Blackf. 149; 1 Smith Lead. Cas. 121." This case was decided at a time when a mortgage in this state carried the fee, and it was held that, as the assignment of the several mortgages was informal, the legal title to the land did not pass to the assignee so that he could have the benefit of the covenants of ³²² warranty. The rule is somewhat ancient and technical, but it passed into the jurisprudence of this state at an early day and has stood unchallenged ever since. The weight of authority against it is not so great that we feel impelled to depart therefrom: See *McGoodwin v. Stephenson*, 11 B. Mon. 21; *Mayor etc. of Carlisle v. Blamire*, 8 East, 487.

2. Under this head it is urged that, no title or possession having been shown in the defendant or his grantee, there was no such privity of estate as would carry the covenants to subsequent purchasers. Although the court refused so to find, the evidence is undisputed that defendant was never in possession of the north ten feet of the west twenty-four feet of lot 8. His deed from Argus expressly excepted this tract, but it was included in defendant's deed to Eckert. There is no proof that Eckert ever took actual possession of the disputed tract, or that any subsequent grantee ever did until the land came to Poppe. In absence of proof, the presumption is that possession follows ownership: *Mygatt v. Coe*, 147 N. Y. 456, 42 N. E. 17. The rule is universal that, in order to carry the covenants in a deed to subsequent grantees, there must be actual or constructive seisin. In absence of both right and possession, all the elements which constitute an estate are necessarily want-

ing, and the covenants contained in the grant must remain in the grantee, from the absence of everything which can carry them further: 1 Smith Lead. Cas., 8th ed., 205, and cases cited.

In New York the rule is thus stated: "Privity of estate is essential to carry covenants of warranty and quiet enjoyment to subsequent grantees in order to support a right of action by them against the original covenantor when there has been an eviction by paramount title": *Mygatt v. Coe*, 147 N. Y. 456, 42 N. E. 17; 152 N. Y. 457, 57 Am. St. Rep. 521, 46 N. E. 949. In a note to *Spencer's Case*, 1 Smith Lead. Cas., 9th Am. ed., 224, it is said: "If any estate passes from the grantor to the grantee in a conveyance, it is enough to carry covenants. But if the title of ³²³ the grantor wholly fails, so that no title to the land passes to the grantee, with which the covenants can run, the grantee can take no advantage of them." The following cases are cited to support the text: *Slater v. Rawson*, 1 Met. 450; 6 Met. 439; *Beardsley v. Knight*, 4 Vt. 471; *Devore v. Sunderland*, 17 Ohio, 52, 49 Am. Dec. 442; *Martin v. Gordon*, 24 Ga. 533; *Burtners v. Keran*, 24 Gratt. 42; *Allen v. Greene*, 19 Ala. 34. The general rule is that the covenant of a stranger to the title is personal to the covenantee, and is incapable of transmission by a mere conveyance of the land: *Mygatt v. Coe*, 152 N. Y. 457-466, 57 Am. St. Rep. 521, 42 N. E. 17.

In *Nichol v. Alexander*, 28 Wis. 118, this court held that if a grantor, by full covenant deed of warranty, assumes to convey unoccupied lands to which he has no title, there is at once a constructive eviction of the grantee, which entitles him to the same remedies that he would be entitled to had he been turned out of the actual possession of the land by legal process. The rule has been reasserted and approved in subsequent cases: *McInnis v. Lyman*, 62 Wis. 191, 22 N. W. 405; *McLennan v. Prentice*, 77 Wis. 124, 45 N. W. 943. We do not see how the rule would be different if the grantor conveyed lands to which he had no title, if they were in the possession of the actual owner. A cause of action arises as soon as the deed was delivered, and was not assigned or transmitted to subsequent grantees by a mere conveyance of the land. We therefore hold that where the record shows that the grantor had no title and no possession, and there is no proof that the grantee took possession, the covenants of the grantor are personal to the grantee, and are not transmitted to subsequent grantees by a mere conveyance of the land. Whether, if the defendant's grantee entered into the immediate possession of the land after delivery

of the deed, that fact would be sufficient to carry the covenants, is a matter of some doubt. There are respectable authorities upon both sides of the question, but, it not being fairly in this case, we leave it for future consideration.

³²⁴ 3. The proof regarding eviction by paramount title is as follows: Mrs. Patchin commenced an action against Poppe, claiming a paramount right to the disputed tract. No notice of this suit was given defendant until long after judgment had been rendered. Poppe then brought suit against plaintiff on the covenants of his deed. Notice of this suit, with a demand to defend, was served upon defendant forty-two days after its commencement, which the court finds was "before the time for answering had expired." This finding is excepted to, and there is no evidence in the record to support it, except the inference arising from the fact that plaintiff's answer in that action was verified after the date of the service of notice upon defendant. This evidence is of doubtful value in respect to the question whether the notice was timely or not. But this is not a matter of importance in this case. It is conceded that defendant had no notice of the Patchin judgment until after its rendition. Certainly, he was not bound by it. If otherwise entitled to recover, notice to defendant of the former action was not necessary to plaintiff's right to recover in this action: Rawle on Covenants, sec. 124. Where, however, it is sought to bind a covenantor by notice, as said in *Somers v. Schmidt*, 24 Wis. 417, 1 Am. Rep. 191, it must be from the covenantee, in time to answer and defend, and perhaps accompanied by a request to defend: See *Eaton v. Lyman*, 26 Wis. 61; 33 Wis. 34; *Saveland v. Green*, 36 Wis. 612. The complaint in *Poppe v. Wallace, Jr.*, alleged that the latter had due notice of the Patchin suit, and was tendered its defense, and such allegation is found to be true in the findings. Hence, if defendant had appeared in that suit, he would have been met by proof of a judgment of paramount title, final and conclusive against the plaintiff. Of this judgment defendant had no notice, and he was not bound by it. In this case the only evidence of paramount title and eviction was the two judgment-rolls in the cases before mentioned. As bearing upon the probative force of ³²⁵ the Patchin judgment as against defendant, we quote the following from 2 Devlin on Deeds, section 937: "There has been some discussion, resulting in a variance of opinion, as to what effect a judgment possesses when the covenantor has not been notified of the suit and was not requested to defend. Of course, such a judgment cannot bind the cove-

nantor. It has been asserted that, although the defendant might inquire into the merits of the judgment, yet it was prima facie evidence of the existence of a paramount title. But the more reasonable rule, and the one sustained by authority, is that the judgment, when no notice has been given and the covenantor is not a party to the suit, is not even prima facie evidence that the eviction was founded upon an adverse and paramount title." The number of cases cited to sustain the author's conclusion would seem to indicate that it was very well grounded. At most the judgment in the Poppe case would only be binding upon defendant as to the amount of the recovery, and of that there may be some doubt.

Adopting the rule that the Patchin judgment was not prima facie evidence against the defendant of the existence of a paramount title, or of eviction thereby, we find nothing in the record to support the judgment. The rule is well stated in Rawle on Covenants, fourth edition, 150, thus: "And in all cases it must be borne in mind that, if the purchaser choose to retire before the paramount title, it is at his own risk; and in the suit against his covenantor he must assume the burden of proof, and make out the adverse title to which he has yielded with as much particularity as if he were suing in ejectment, unless, of course, the adverse right of possession has been established by a judgment or decree in a suit of which the covenantor has been properly notified, in which case the burden of proof will not only be removed, but the judgment or decree will be conclusive evidence of the validity of the paramount title."

326 So, upon all the grounds mentioned, the right of plaintiff to recover is defeated. It is but proper to say that the second and third questions herein considered do not appear to have been urged before the trial court.

By the Court. The judgment of the circuit court is reversed, and the cause is remanded with directions to enter judgment for defendant.

On April 30, 1901, the mandate was modified so as to read as follows: The judgment is reversed, and cause is remanded with direction to enter judgment for defendant, unless the trial court, upon notice and application, in its discretion and upon such terms as may be just, grants a new trial of the action.

A CONVEYANCE BY A HUSBAND TO HIS WIFE is not void. Its effect is to give her an equitable estate while he holds the

legal title as her trustee: *Ogden v. Ogden*, 60 Ark. 70, 46 Am. St. Rep. 151, 28 S. W. 796. Such a conveyance will be upheld so far as it is equitable: *Note to O'Connell v. Taney*, 25 Am. St. Rep. 279.

THE COVENANT OF A STRANGER to the title, it appearing from the deed that he did not claim the property which he purports to convey, is personal to the covenantee: *Mygatt v. Coe*, 152 N. Y. 457, 57 Am. St. Rep. 521, 46 N. E. 949. A covenant of seisin does not run with the land where the grantor is not in possession, in fact or in law, at the time of conveyance: *Devore v. Sunderland*, 17 Ohio, 52, 49 Am. Dec. 442. See, also, the monographic note to *Morse v. Garner*, 47 Am. Dec. 573. It seems that covenants running with the land apply only to legal estates, and not to equitable: *Watson v. Blaine*, 12 Serg. & R. 131, 14 Am. Dec. 669.

ILLINOIS STEEL COMPANY v. BILOT.

[109 Wis. 418, 85 N. W. 402.]

WATERS—BEDS OF LAKES—TITLE TO—VESTING OF, IN STATE.—The title to the beds of all lakes, ponds, and navigable rivers, up to the line of ordinary high-water mark, within the boundaries of the state, became vested in it at the instant of its admission into the Union, in trust for the benefit of its people, so as to preserve to them forever the enjoyment of the waters of such lakes, ponds and rivers to the same extent that the public are entitled to enjoy tidal waters at the common law.

WATERS—BEDS OF LAKES—GOVERNMENT PATENT TO—WORTH OF.—The title to lands under lakes, ponds, and navigable rivers of the state was never in the United States, except in trust for public purposes; and a patent from the United States, covering such lands, whether made before the state was admitted into the Union or thereafter, conveys no title. A government patent of land bordering on a lake or pond, regardless of the boundaries thereof according to the government survey, does not convey title to the lands below the line of ordinary high-water mark.

WATERS—BEDS OF LAKES AND NAVIGABLE RIVERS—TITLE TO—POWER TO CHANGE.—Except with respect to a qualified title to submerged lands of rivers navigable in fact, conceded to shore owners, but which is not permitted to displace or materially affect public rights, the title to lands under lakes, ponds, and navigable rivers of the state is in the state, and it is powerless to change it. It cannot transfer such title by grant or otherwise.

ADVERSE POSSESSION—LAND HELD BY THE STATE. No title can be obtained, by adverse possession for twenty years, to land held by the state in any capacity.

WATERS—BEDS OF LAKES—TITLE TO—CHANGE OF, BY FILLING.—The title to land under lakes and ponds, held by the state, does not change by reason of the fact that such lakes

or ponds are artificially filled, so as to raise the land above the surface of the water.

EJECTMENT CANNOT BE MAINTAINED TO RECOVER THE BED OF A LAKE, though the plaintiff establishes ownership of the natural shore.

IN EJECTMENT, THE PLAINTIFF MUST RECOVER ON THE STRENGTH OF HIS OWN TITLE, not on the weakness of his adversary's title.

ADVERSE POSSESSION—BED OF WATERS, WHEN SUBJECT TO LAW OF.—When land is part of the bed of navigable waters of such a character that a qualified title thereto passes to the owner of the shore as an incident thereof, it is subject to the law of adverse possession.

ADVERSE POSSESSION OF LAND COVERED BY WATER IS NOT IMPOSSIBLE if such land is the subject of private ownership, adverse possession thereof may be acquired by any means which actually and notoriously exclude the true owner therefrom, effectually dispossessing him thereof. Other means than physical exclusion by residence thereon, or by inclosing the same, will accomplish it.

EJECTMENT FOR SUBMERGED LANDS—WHEN A VERDICT FOR THE PLAINTIFF SHOULD NOT BE DIRECTED.—In ejectment for submerged land included in a government survey and patent, where there is evidence that the locus in quo is a part of the bed of a lake, or that it is appurtenant to the bank of a river, the court should refuse a motion to direct a verdict in favor of the plaintiff, and leave the cause to the jury, under proper instructions, although the plaintiff's paper title from the government is prima facie perfect, for if the jury find that the locus in quo is in fact a part of the bed of a lake, this will overthrow the plaintiff's title, and if it is appurtenant to the bank of a river, they may find such an adverse possession as to take the title thereto from the holder of the paper title.

WATERS—BEDS OF LAKES—PATENT TO, WHEN A NULLITY—PLATTING—EFFECT OF.—It is the physical fact of whether patented land is in a lake or not that governs. If it is shown upon the government plat to be dry land and it is sold as such, but in fact it is within the boundaries of a lake, the paper from the government purporting to convey title thereto is a nullity. The platting of land in the bed of a lake as dry land does not affect the title thereto. It is the fact of its being in the bed of a lake which governs, not the mapping of the territory by the government.

WATERS—WHAT DOES NOT PRECLUDE A BODY OF WATER FROM BEING A LAKE.—The mere fact that water is very shallow, so that marsh grass appears above the surface; that it is called a marsh; that the water is not deep enough to admit of navigation; or that the surface is not at all times wholly submerged, does not preclude its being in fact a lake. Neither does the size or depth of a body of water solve the question of whether it is a lake or a river.

WATERS—LAKES AND RIVERS.—NO TITLE BY PATENT from the government can be obtained to land which is inside of the natural shore of a lake, or of any body of water not a river, so that the water does not merely beat upon it as a shore,

but covers it; or to land covered by water, not a part of a lake, yet not a part of a river.

OCCUPANCY OF LAND NECESSARY TO ADVERSE POSSESSION need only be such actual possession as the subject of it is adapted to under the circumstances of the particular case and such as is reasonably sufficient to attract the attention of the true owner, and put him on inquiry as to the nature and extent of the invasion of his rights.

ADVERSE POSSESSION — INCLOSURE — REQUISITE CHARACTER OF.—If an inclosure of land is, of itself, relied upon to establish an occupancy thereof necessary to adverse possession, it must be of a substantial character in the sense of being appropriate and effective to reasonably fit the premises for some use to which they are adapted.

ADVERSE POSSESSION—IMPROVEMENT—WHAT SUFFICIENT.—If an improvement of premises is relied upon to establish occupancy of land necessary to adverse possession, any actual, visible use to which similar premises are usually devoted may be sufficient, whether the result be to increase or decrease the same in value, or destroy the natural value entirely.

ADVERSE POSSESSION—WHAT HOSTILE USE IS SUFFICIENT.—It is not essential to adverse possession that there should be such an actual occupancy of premises as to indicate, at every instant, by mere observation, the extent of the hostile use. It is sufficient if there is such a continuous, exclusive, hostile use as, in the judgment of the jury, under all the circumstances, will notify the true owner, actually or constructively, of the invasion of his rights and the actual extent thereof.

ADVERSE POSSESSION FOR THE PURPOSE OF HUNTING AND FISHING—JURY QUESTION.—It should be left to a jury, under proper instructions, to say whether a continued, notorious use of premises, covered by water, for the purpose of hunting and fishing, coupled with other circumstances, constituted such an adverse occupancy thereof as to dispossess the true owner.

IT IS NOT NECESSARY TO THE DEFENSE OF ADVERSE POSSESSION to produce evidence tending to show that the defendant was adversely possessed of the whole of a territory, which includes the locus in quo, or to show the exact boundaries of his adverse possession.

Ejectment. The twenty year statute of limitations was relied upon as a defense. The plaintiff showed a prima facie record title to a portion of two lots, and that such portion included the premises in dispute. The defendants' evidence was to the effect that the territory of which the premises in dispute formed a part was called "Jones island"; that it was land, or a sand flat, covered by the waters of Lake Michigan, from three to nine feet deep, at least, with the exception of a small place large enough to locate a mill upon; and that it was feasible to construct buildings thereon by artificial filling. In 1872 some nine families resided on the territory called "Jones island." It was then, and had been theretofore and was there-

after, all covered by water, except as artificially changed. In 1872 one Truher had a house on the submerged territory, supported in some way in the shallows, or resting on a piece of made land, but just how did not clearly appear. Truher pretended to exercise dominion over the entire territory and prevented any person from locating thereon without his permission. In 1872 Truher made a verbal transfer of his house to one Jacob Muza, and authorized the latter to exercise the same control that he had over the entire territory, but there was no paper transfer. Muza took such possession as was practicable, and exercised dominion as Truher did. Muza testified that when Truher gave him the property it was all submerged by water and mud as deep as over his head; and that the particular place allotted by him to Bilot was of no use until artificially raised above the level of the water. After Muza pointed out to Bilot the place he might occupy, the latter, about thirteen years before the commencement of this action, immediately commenced to fill up the property, and soon had a filling upon which he built a house, that he occupied thereafter all of the time down to the commencement of the action. The court directed a verdict for the plaintiff, and judgment was entered accordingly. The defendants appealed.

Fiebing & Killilea, M. C. Krause, and O. J. Fiebing, for the appellants.

Van Dyke & Van Dyke & Carter and W. E. Carter, for the respondent.

424 MARSHALL, J. We understand the statement which appears in the record, as to the proof of title upon which plaintiff rested its claim and secured the judgment appealed from, to mean this: A record was exhibited which purported to show that the United States or the state of Wisconsin, most likely the former, prior to 1872, made a patent, in form conveying to private ownership a certain government subdivision of land within and according to the public land survey; that such title as was thus acquired was by mesne conveyances vested in plaintiff before the commencement of this action; and that the premises in controversy are within the boundaries of such government subdivision according to such survey. That proof made out a prima facie title. The case seems to have been tried and decided upon the theory that it was sufficient to entitle plaintiff to recover unless defendants were able to show a better title by adverse possession.

425 The learned counsel for respondent, evidently assuming that the actual possession of lands submerged by water, necessary to satisfy the requisites of adverse possession so as to gain title in that way, is difficult, if not impossible, encouraged defendants' witnesses to make it appear as clearly as possible that when the adverse possession in controversy commenced, and for a long time thereafter reaching up to within about thirteen years of the time of the commencement of the action, the particular land in question was covered by water from three to nine feet deep; that such was its condition when appellants took possession thereof; and that there had been no change in that regard except by artificial filling.

There is evidence tending to show that there was some dry land within the territory over which Muza assumed dominion in 1872. But the indications are that the greater part of such territory was then covered by the waters of Lake Michigan or of an arm of the lake partaking of its character, or by some expanse of water governed by the law relating to the title to the beds of lakes and ponds, and that the premises in question were formerly a part of such submerged land. Now, if such indicated facts are the truth of the matter, the land belongs to the state of Wisconsin, regardless of whether the United States or the state has in form transferred it to private ownership. The law in that regard is too well settled to warrant any discussion of it here. This court has been over the whole subject many times in recent years. The title to the beds of all lakes and ponds, and of rivers navigable in fact as well, up to the line of ordinary high-water mark, within the boundaries of the state, became vested in it at the instant of its admission into the Union, in trust to hold the same so as to preserve to the people forever the enjoyment of the waters of such lakes, ponds, and rivers, to the same extent that the public are entitled to enjoy tidal waters at the common law. A patent 426 from the United States, so far as it purports to cover any of such lands, whether made before the state was admitted into the Union or thereafter, is ineffectual. It has been so repeatedly held. A government patent of land bordering on a lake or pond, regardless of the boundaries thereof according to the government survey, does not convey title to the lands below the line of ordinary high-water mark. The United States never had title, in the Northwest Territory out of which this state was carved, to the beds of lakes, ponds, and navigable rivers, except in trust for public purposes; and its trust in that regard was transferred to the state, and must there continue forever,

so far as necessary to the enjoyment thereof by the people of this commonwealth. Whatever concession the state may make without violating the essentials of the trust, it has been held, can properly be made to riparian proprietors. Under that, by long-established judicial policy, which has become a rule of property, a qualified title to submerged lands of rivers navigable in fact has been conceded to the owners of the shores. Otherwise the title to lands under all public waters is in the state, and it is powerless to change it. It cannot transfer such title by grant or otherwise, nor can title thereto be obtained by adverse possession, at least unless such adverse possession shall continue for the term of forty years. Hence, we must presume from the evidence that the title to the land in dispute is where the evidence tends to show it is. We should say in passing that the term "qualified title," as above used, refers to that interest in the beds of navigable streams which has passed to private ownership according to the uniform holdings of this court—a full title, subject to the public rights which were incident to the lands forming such beds at the time of the creation of the trust above mentioned. No private ownership has been conceded which displaces or materially affects such public rights. As to them the state has not abdicated and cannot abdicate its trust.

⁴²⁷ There is no need of enlarging on this matter. As before indicated, this court has in recent years several times declared the law as here stated, grounding such declaration upon indisputable principles and the law as laid down on the subject by the supreme court of the United States: *McLennan v. Prentice*, 85 Wis. 427, 55 N. W. 764; *Priewe v. Wisconsin State etc. Co.*, 93 Wis. 534, 67 N. W. 918; *Ne-pec-nauk Club v. Wilson*, 96 Wis. 290, 71 N. W. 661; *Willow River Club v. Wade*, 100 Wis. 86, 76 N. W. 273; *Pewaukee v. Savoy*, 103 Wis. 271, 74 Am. St. Rep. 859, 79 N. W. 436; *Barney v. Keokuk*, 94 U. S. 324; *Railroad Co. v. Schurmeir*, 7 Wall. 272; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 13 Sup. Ct. Rep. 110; *Yates v. Milwaukee*, 10 Wall. 497.

So plaintiff's *prima facie* title was overcome by the evidence tending to show that the premises in question were naturally a part of the bed of Lake Michigan, or some arm or bay thereof, or some body of water having the incidents of a lake: and the verdict should not have been directed in plaintiff's favor. If the fact be that such is the natural character of the land, plaintiff cannot maintain ejectment therefor in any event, even if it shall establish ownership of the natural shore,

though, of course, in such circumstance, it would not be without remedy for any wrong to it not common to the public: *Austin v. Rutland Ry. Co.*, 45 Vt. 215; *Coburn v. Ames*, 52 Cal. 385, 28 Am. Rep. 634; *Gray v. Bartlett*, 20 Pick. 186, 32 Am. Dec. 208; *Stockham v. Browning*, 18 N. J. Eq. 390.

What has been said regarding plaintiff's title requires a reversal of the judgment in any event, for it can only recover on the strength of its own title, not on the weakness of Bilot's. However, it is deemed best to correct some erroneous ideas that seem to have influenced the direction of the verdict as bearing on appellant's claim of title. If it shall finally turn out that the premises in question were not originally a part of the bed of Lake Michigan, nor of any expanse of water partaking of the character of a lake as regards the title of the bed thereof, but were part of the bed of navigable waters of such a character that a qualified title ⁴²⁸ thereto passed to the owner of the shore as an incident thereof, then they are subject to the law of adverse possession. And if in such circumstances Muza, under whom Bilot claims, maintained from 1872 until Bilot took possession of the premises a condition which disseised the true owner, and Bilot continued that condition so as to cover the full period of twenty years, his title is governed by the principles declared in *Illinois S. Co. v. Budzisz*, 106 Wis. 499, 80 Am. St. Rep. 54, 81 N. W. 1027, and the settled law on the subject.

It is not true, as seems to have been supposed, that adverse possession of the premises was impossible while they were covered by water. Notwithstanding such condition the true owner may have been disseised, and that was all that was necessary to start the limitation period running. Any act or acts sufficient to destroy the true owner's dominion over the property, whatever its character, is a disseisin, within the meaning of the limitation statute: 3 Washburn on Real Property, *495. Physical exclusion by an inclosure of the property of some kind is by no means necessary; neither are the requisites of section 4212 of the Statutes of 1898 essential: *Wilson v. Henry*, 40 Wis. 594; *Lampman v. Van Alstyne*, 94 Wis. 417, 67 N. W. 171. It has been held that evidence of the mere taking of seaweed to the exclusion of all others is sufficient proof of disseisin to carry a case to the jury on that subject: *Trustees etc. of East Hampton v. Kirk*, 84 N. Y. 215, 38 Am. Rep. 505. Actual, visible, hostile appropriation of the premises to the exclusion of the true owner in any way satisfies all the requisites of disseisin, and that condition may be created by any means

that entirely exclude the true owner from the property. It does not require constant residence of the appropriator on the property. Private interest in submerged land of the character we are discussing, *prima facie* at least, exists only as an incident of title to the bank or shore. He who is in actual possession of that is constructively in possession of everything that is incident thereto. If possession of the former ⁴²⁹ ripens into title, the title to the latter goes with it: Gould on Waters, sec. 37, and cases cited in the notes.

Applying the principles last stated to the evidence as to defendants' title, it is easily seen that the case in that respect should have been submitted to the jury even upon the trial court's theory as to plaintiff's title. There was evidence tending to show that for more than twenty years before the commencement of this action the person holding *prima facie* government title had been, in the right now claimed by Bilot, dis-seised thereof. There is evidence tending to show that Muza, from 1872 till Bilot commenced the artificial change of the property, exercised such dominion over the same as to prevent any person from enjoying it in any way except by his permission. Such evidence tends to show more than a mere claim of dominion. That clearly would be insufficient. It shows that there were physical acts of prohibition, so that Muza's claim was notorious, recognized, and submitted to, and that such acts were accompanied by actual occupation and enjoyment of the beach or dry land adjoining, if there was any. In the face of such evidence, plaintiff was not, in any phase of the case, entitled to the direction of a verdict, but the cause should have been submitted to the jury under proper instructions.

It is hoped that on the next trial of this case all the facts will be clearly brought out in the light of all the legal principles applicable thereto, and that such principles will be kept clearly in view; also that the precise location of the property in dispute will be shown, so that it can be identified with reference to the original shore line and the present shore line. That there was a failure, upon the trial we have reviewed, in respect to the matters referred to, is most clear. That has rendered it impracticable for us to lay out a definite line for future guidance in the case. The assumption that plaintiff's title was good originally, merely because it came from the government, and the assumption that, merely because ⁴³⁰ the land was submerged, it could not be held adversely, and the further assumption that actual possession was necessary, independent

of actual possession of the shore, all seem to have had influence with the trial court.

By the Court. The judgment of the superior court is reversed, and the cause remanded for a new trial.

Bardeen, J., took no part.

A motion for a rehearing was duly submitted in this case and was decided March 19, 1901, the following opinion being filed:

MARSHALL, J. The argument on the motion for a rehearing has received that consideration which the learned counsel for respondent earnestly invoked for it, without our being able to indorse the reasons assigned for changing the judgment entered, though such reasons are urged with such earnestness and confidence that a departure from the usual course in disposing of such matters, by filing an opinion pointing out what appears to be the weakness thereof, seems advisable.

As a preface to what we shall say it seems proper to make a few observations in respect to the right attitude of counsel, so unfortunate as not to have their side of a controversy viewed here as they view it, on the first presentation of their case, in measuring the situation in which the adverse judgment places them and solving the question of whether a further effort here should be made or not. The situation of counsel at such a time, especially where great interests are involved and the decision disappoints hopes born of a careful study of a subject, is well suited to test to the utmost that power of calm consideration of the reasons and authorities, supposed to lead up to and require the adverse decision, necessary to enable a person to give due weight thereto. ⁴³¹ But, as said on a similar occasion (Brown v. Chicago etc. Ry. Co., 102 Wis. 151, 77 N. W. 748, 78 N. W. 771), whether counsel stand the test or not, the duty of this court to carefully and dispassionately reconsider a determination of old questions in the light of old and new reasons, and to do the same as to any new point advanced which was overlooked by counsel on the first presentation, uninfluenced by any other consideration than that of a desire to discover and pronounce the law correctly, remains the same. It is hoped and believed that the learned counsel's second argument has received that consideration. Whether such argument indicates that it was presented and guided by the state of mind necessary to properly weigh an adverse decision may best be judged by the

reasons advanced to disturb it and the support thereof pointed out for consideration.

The opening pages of counsel's argument are devoted in the main to a personal vindication and a vindication of the trial court, the excuse being kindly made at the start, for the treatment of the case by this court which calls for such vindication, that it was characterized by haste as a result of press of business. Whatever the motive of the learned counsel—and we will not indulge in the idea nor doubt at all but that it was worthy—the intimation that the case did not receive proper consideration here because of press of business, though made and repeated in such a way as to challenge reflection, is one that a person, conscious of the full scope of its meaning, will not make at all unless he desires to say that judicial duty has not been properly performed. We are safe in saying that counsel does not intend to say that. Yet, as it seems, haste, strictly so called, in work so important, is not excusable by pressure of business. It is not understood here that pressure of business is any excuse for a hasty consideration and disposition of the rights of anyone. If that supreme virtue, charity, moved counsel to assign the weight of the burden resting here as an excuse ⁴³² for haste, it should be understood that there is no one here who believes that the mantle of such virtue reaches far enough to accomplish counsel's purpose. Here is centered the last hope of every party conceiving himself aggrieved in a trial court for the ultimate attainment of justice, and everyone here, it is believed, is fully conscious of that fact, and aims to labor with the deliberation and patience and industry and courage necessary to discover and determine the truth both as to the law and the fact, blind to the effect thereof upon counsel or courts that had first to do with the matter, or the effect upon particular parties, whether high or low, devoting all the time requisite to that end, unconscious, for the time being, of any interfering burden. The learned counsel whose work we now have before us, being thus informed, will of course not ground the reargument of a case hereafter upon any assumption of excusable haste by this court in deciding it at first.

Counsel complain because in the former opinion it was suggested that on the next trial an effort be made to establish all the facts that are material in the light of the legal principles discussed, and that such principles be kept clearly in view from the beginning to the end of the trial; that the particular loca-

tion of the property in dispute be indicated with reference to the original and present shore line of Lake Michigan. They say much evidence was introduced showing that plaintiff's title was *prima facie* perfect from the government, and that it was so stated in appellant's bill of exceptions. Why was that not sufficient, we are asked, and why should all the evidence have been put into the record, which would have resulted only in showing what was admitted—that is, that plaintiff's evidence established a *prima facie* title? If there were any doubt that the admonition complained of was proper and advisable in the interests of a speedy and just determination of this litigation, and that the profit that may probably flow from ⁴³³ attention to it is certainly as valuable to respondent as appellant, counsel's course of reasoning above indicated would remove it. A study of the former opinion seems not to have impressed upon the mind of counsel the fact, as it is, that there was no criticism whatever of respondent's *prima facie* case. There was no intimation that counsel was not diligent and thorough, nor that the learned trial court did not give due weight to the evidence bearing on that question. There being no criticism in that respect, there is no need for any vindication of either counsel or the court. It was proper to leave out of the bill of exceptions the record evidence showing respondent's *prima facie* case and to supply its place by an admission of the fact. Full credit was given to that admission in the decision rendered. The difficulty is that the significance of evidence produced by appellant and drawn from his witnesses by the cross-examination pointing to the probable existence of facts inconsistent with the *prima facie* case, was overlooked on the trial, overlooked on the argument in this court, and, if we fully understand now the argument on this motion, the same indications are yet present. No one will dispute that the paper title from the government *prima facie* showed that respondent was entitled to recover. But if there was evidence tending to show that the territory included in the government survey and patent, instead of being dry land, was covered by a part of the waters of Lake Michigan, then the trial court, on the motion for the direction of a verdict in plaintiff's favor, was bound to hold that the jury might find that such was the fact and that plaintiff's *prima facie* title was thereby overthrown. Again, if there was evidence tending to show that the locus in quo was appurtenant to the bank of a river which had been adversely possessed so as to take the title thereto from the

holder of the paper title, the court, on the motion to direct a verdict, was bound to hold that the jury ⁴³⁴ might find the facts in defendant's favor, necessary to that result.

Counsel complain that we failed to give them and the court due credit for legal learning, and that we assumed that they did not know that private ownership in the bed of a lake cannot be acquired from the government. As we understand the contention, it is this: Respondent's counsel having produced evidence making out a prima facie case, there was no need to consider the subject of the disability of a private person to acquire title to the bed of a lake, so it is unjust to counsel to assume, because they paid no attention to that matter, that they were not possessed of all the legal knowledge applicable thereto. Of course, there was no purpose in the opinion to reflect on the legal ability of court or counsel. We hold both in the highest esteem; but that cannot militate against speaking of cases as they are presented to us by the record, however eminent counsel or court may be or who may be connected therewith. Probably there has not yet been counsel so eminent or court so learned but that mistakes have occurred, and such situation will undoubtedly continue. That is clearly demonstrated by the following.

Of course, counsel fully understand that a person cannot acquire private ownership in the bed of a lake, yet they insist that when a mere paper title is made to what appears to be dry land by the government plat and the government patent, such appearances are conclusive on the question of title, overlooking the fact that it has been decided over and over again, by this and other courts, that it is the physical fact of whether patented land is in a lake or not that governs. If it is shown upon the government plat to be land, and it is sold as such, but in fact it is within the boundaries of a lake, the paper purporting to convey title thereto is a nullity. That is elementary. A large number of cases are cited to it in the former opinion. We will not add to them ⁴³⁵ here. So if we acquit counsel for not bearing in mind that a person cannot become the owner of the bed of a lake, they make it more probable than before that on the former trial it was not borne in mind that a mere paper title to territory that is in fact a part of a lake, even if the pictured representation thereof made in the government land office shows it to be dry land, must fall before the physical situation that it is in a lake.

The subject above discussed has been sufficiently treated, but counsel may think their argument on the motion for a

rehearing has not received consideration in detail if we omit to refer to their suggestion that we could have obtained considerable light on their position by attention to the first forty-five pages of their printed argument, which, it is assumed by counsel, we did not study. That assumption is right. Counsel's argument covered fifty-two pages. The first forty-four related to matters not covered by the assignments of error. That came about by the preparation of respondent's brief without the benefit of appellant's brief. As the case was finally submitted, all of the argument of respondent's counsel, except about seven pages, was entirely eliminated from the case, and we were no more called upon to examine it than to examine their brief in some other case. But if we had taken the time to read the whole argument, the only influence it could have had, if any, would have been to confirm our impressions that the significance of the physical condition of the premises in question, in respect to whether covered by the waters of Lake Michigan or by water partaking of the characteristics of a lake as to the title to the bed thereof, or covered by water adjacent to a shore adversely held, was overlooked.

We are appealed to by counsel to draw on all the resources which we can properly take judicial notice of, notwithstanding omissions to bring the same to our attention. The answer to that is that the actual, physical situation of ⁴³⁶ the premises in question cannot be controlled by maps or plats. If what was the bed of the lake has been platted as dry land, the platting does not affect the title. If, as before indicated, land has been pictured on government plats as land, which was in fact in a lake, the fact governs, not the mapping of the territory by the government.

It does not seem that we are called upon to discuss the evidence which we said raised the question of whether the premises in dispute were a part of the bed of a lake. We did not pretend to give the evidence of witnesses word for word, but to state the effect thereof—not the conclusive effect by any means, but the effect as a court must view it in determining whether the direction of the verdict was proper. We were bound, as of course the trial court was, to give appellant the benefit of the most favorable inferences that could reasonably be drawn from the evidence. All the facts which such inferences pointed to, we were bound to consider as established and verities in the case because the jury would have had a right to so decide had they been permitted to do so.

We will make a few references to the testimony at this time for the purpose of supporting the views expressed above. Counsel say this court said that Jones testified that the entire territory was covered with water in 1855; that if by "entire territory" Jones island is meant, the court entirely misapprehended the witness' testimony. It is evident counsel views the evidence from the standpoint of the favorable inferences it will bear for respondent, while we view it in the light of the most favorable inferences it will reasonably bear for appellant. There is the trouble. The witness said: "The condition of the island in 1855, it was pretty nearly a marsh. The mill was very small and it occupied very near the whole of it. The condition of the island compared with what it was in 1855, it is not hardly the same place. There is much more land now than there was then. In 1855 sailboats ⁴³⁷ went by way of the cut right over the center of the island. The soil on either side of that cut was all sand, not marsh in through the cut. That was washed in there, but marsh all around it, though, pretty near. When the wind was off the lake the marsh would be submerged in water. There was some water on there all the time, but it would rise and fall." Now, it seems that a fair inference from that evidence is that in 1855 substantially all of the island, except a small place large enough to locate a mill upon, was covered by water. Sometimes it was shallow, so as to have the appearance of a marsh or swamp, and at other times it was so submerged as to hide those indications. The water raised and lowered with the lake, said the witness. A witness by the name of Kunka testified that in 1872 he went onto the island and there was marsh grass there; that the water would rise and fall; that the water was from two to three feet deep; that there was marsh grass growing there. In its natural state, unaffected by any disturbing causes, the water was flowing. Sometimes the water would be still and other times not. "The time I first came there, there was no solid ground on the island whatever." This question was asked the witness: "When you came there how much water was there on the average, spread over the island?" To which he answered: "It was in places seven feet, eight feet, nine feet, and ten feet; the shallowest point about four feet and probably five feet. It was that way all over the island." Again the witness said: "It is true that those people who are living on Jones island when they came there filled up a part and built on it. The business of all living on the island when I went there was fishing, and in order to get to their houses they would have to go in boats." There are other

indications in the evidence, too numerous to mention in view of what was said in the former opinion, that what the witness called a marsh or swamp was covered with water, not deep enough, however, when the lake ⁴³⁸ was at rest, so but that vegetation which commonly grows in shallow water appeared on and above the surface. Muza called the territory where Bilot's house was located a swamp, and yet the water was said to be from three to six feet deep, according to the condition of the water in the lake. Bilot said he floated the material to his place to fill with, and went to and from it in a boat. Muza said that when he went to the island it was all swamp, marsh, mud, and water as deep as over a man's head; that in the locality of Bilot's place the water was sometimes still and sometimes flowing; that it depended upon the lake; that most of the time the water was still. The evidence is replete with indications that the water on the marsh, so called, was lake water, not river water; that it had very little, if any, movement indicating a river, and that the indications of the characteristics of a lake were sufficient to warrant a jury, under proper instructions, in finding that the territory in question was formerly lake bed.

From the foregoing it seems that all said in the former opinion as to the evidence presenting questions of fact that should have been solved by a jury under proper instructions, is fully sustained by the record. Was the territory in question originally a part of the bed of a lake or pond, or part of the bed of a river? The mere fact that the water was very shallow, so that marsh grass appeared above the surface, that it was called a marsh, and that the water was not deep enough to admit of navigation, or that the surface was not at all times wholly submerged, does not preclude its being in fact a lake. All those conditions existed in *Ne-pee-nauk Club v. Wilson*, 96 Wis. 290, 71 N. W. 661, yet it was held there that the territory in dispute was a lake. Size or depth of a body of water, it was there said, does not solve the question of whether it is a lake or river. If the land in question was inside of the natural shore of Lake Michigan, or of any body of water not a river, so that water did not merely beat upon it as a shore, but covered it, or if the land was covered by ⁴³⁹ water, not a part of Lake Michigan, yet not a part of a river, manifestly plaintiff never obtained title thereto through or under the patent from the government.

Complaint is made because, in the statement of facts upon which the former opinion was based, it was said that Truher pretended to exercise dominion over the entire territory, and

prevented any person from locating thereon without his permission. Notwithstanding the confident assertion of counsel that there is no such evidence in the record, either in a literal sense or within the range of reasonable inferences, we still think that, on the whole, what was stated and is so criticised is a fair inference from the testimony of Muza. Certainly Truher, according to Muza's evidence, pretended to own the island. He was living there when Muza came upon the scene. He asserted the right of dominion over the island. He pretended to sell and deliver possession thereof to Muza, asserting at the time that no one could take it from him but Lake Michigan. The difficulty seems to be, as before indicated, that we look at the evidence in the most favorable light it will reasonably admit for appellant, while counsel for respondent view it from the standpoint of the most reasonable inference to be drawn therefrom in its favor. That the latter is not the correct method of testing the record to determine whether the direction of the verdict was proper, need not even be stated.

A few words, now, in respect to what counsel say on the subject of adverse possession, and we are done. If there is anything in the former opinion indicating that there can be constructive adverse possession of land so as to disseise the true owner, without its being based upon a written instrument, and actual possession of part of the premises included in it, we do not know where it is. We said that physical exclusion of the true owner is not necessary to adverse possession, nor is compliance with section 4212 of the Statutes of 1898. That is certainly true, but it is also true that there must be an ⁴⁴⁰ inclosure or usual cultivation or improvement of the property adversely claimed, so as to indicate the boundaries of the adverse claim, and that such claim cannot be extended beyond the actual occupancy. That is the common-law rule and the rule of the statutes as well: Stats. 1898, secs. 4213, 4214. It is also true that all presumptions are in favor of the true owner, and that such presumptions must prevail until overcome by clear proof of continuous disseisin of the true owner for the complete statutory period. But such presumptions do not reach further. The statutory period being completed and satisfied by clear proof of the actual occupancy required, the presumption is turned in favor of the adverse occupant, and it does not make any difference whether the adverse holding was under a written instrument or not. True, there is a distinction between adverse possession under section 4211 and such possession under sections 4213 and 4214. But when that distinc-

tion is satisfied, section 4210 of the statutes of 1898 rules the situation. That provides that in every action to recover real property, or the possession thereof, the person establishing the legal title shall be presumed to have been seised of the property within the time required by law, and the occupation thereof by another deemed subordinate thereto, unless it appears that the premises have been actually possessed for the full period necessary to the acquisition of title in that way under some other provision of the statutes. Disseisin, under section 4212, of an entire tract of land may be accomplished by actual possession of a part of it. Such possession will carry, by construction, possession of the entire tract described in the written instrument of conveyance or the judgment forming the basis of the claim of title. Disseisin, under sections 4213 and 4214, can only be accomplished by and to the extent of actual occupancy, the boundaries thereof being indicated by a substantial inclosure of some kind, or cultivation or improvement in the usual way. No particular kind of inclosure is ⁴⁴¹ requisite. It may be artificial in part and natural in part. Nor is any particular kind of an improvement required, so long as it satisfies what is usual under the circumstances and indicates clearly the boundaries of the adverse occupancy. That is the definite, positive, and notorious *pedis possessio* of the common law, and of the statute (Stats. 1898, sec. 4214) as well—the actual possession characterized by an inclosure, or by such use as is usual for such land. There is no difference between the statutory requisites of such adverse possession and the common-law rule. The former is but a fair declaration of the latter. If one relies upon an inclosure to support a claim of adverse possession, an artificial inclosure is not necessary. The boundaries may be artificial in part and natural in part if the circumstances are such as to clearly indicate that the inclosure, partly artificial and partly natural, marks the boundaries of the adverse occupancy: *Becker v. Van Valkenburgh*, 29 Barb. 319; *Trustees etc. of East Hampton v. Kirk*, 84 N. Y. 215, 38 Am. Rep. 505; *Tyler on Ejectment*, 888. If improvement of the premises is relied upon to mark the boundaries of the adverse possession, it need not necessarily be an actual improvement of the property in value, as the learned counsel for respondent seem to indicate. The term “improvement in the usual way,” as used in the statute, means put to the exclusive use of the occupant, as the true owner might in the usual course of events. That use may be, as it often is, one that adds nothing to the value of the premises. It may even destroy the natural and actual

value—as, for instance, a highway may be acquired by twenty years' uninterrupted adverse use. No one would claim that it would improve the property in the particular lexiconic sense of the word which counsel seem to apply to it as used in the statute. The right to flow land may be acquired by twenty years' continuous, hostile use thereof for that purpose, though the result be to destroy the value thereof. Putting land to the exclusive use of the claimant for collection ⁴⁴² of seaweed is held to be evidence of adverse use, and a usual improvement of land adapted to that purpose. So held in *New York*, where the statutes are the same as ours: *Trustees etc. of East Hampton v. Kirk*, 84 N. Y. 215, 38 Am. Rep. 505; *Clancey v. Houdlette*, 39 Me. 451. In *Archibald v. New York etc. R. R. Co.*, 157 N. Y. 576, 52 N. E. 569, the term "improvement" was treated as synonymous with "use," the court saying: "It cannot be said, as a matter of law upon the evidence in the record, that anyone was in the actual possession or occupation of the parcel during the period of twenty years prior to the commencement of the action. The land was not inclosed or cultivated or put to the exclusive use of anyone."

It must be borne in mind that the distinction between adverse possession under color of title and such possession without that color, is this: In the former the actual possession, by presumption of law, is constructively extended to the limits defined in the paper conveyance or judgment which gives color to the claim of title; while in the latter adverse possession is bounded by the actual adverse occupancy. The essential elements of actual adverse possession are substantially the same where there is color of title and where there is not, though on the question of fact, of whether a possession has the essentials of adverse character requisite to disseise the true owner and start the statute of limitations running against him, particularly the element charging him with notice of the hostile invasion of his right, more persuasive evidence is required in the latter case than in the former: *Sedgwick & Waite on Trial of Title to Land*, 2d ed., sec. 731. So the use, by appellants' counsel and this court, of judicial authorities where the adverse claim was based on color of title in support of the proposition that the evidence in this case required the facts involved to be found by the jury under proper instructions, was legitimate. It shows no disregard of the statutes (Stats. 1898, secs. 4213, 4214), but is in perfect harmony therewith. The actual adverse occupancy ⁴⁴³ that will draw to it, as a matter of law, constructive occupancy under section 4211, is in law and in

fact within the scope of the term "protected by a substantial inclosure," or "usually cultivated or improved," used in section 4214. Whether such occupancy exists in any given case, if to be determined from evidence susceptible of reasonable conflicting inferences, is for the jury to say. The learned trial court, and counsel for respondent as well, recognized that, but, as it seems, it was not correctly applied, because the bearing which the nature of the premises in controversy has in determining the truth was overlooked, or there was a misunderstanding of the meaning of the term "usually improved" as used in section 4214; or due consideration was not given to the fact that reasonable means of knowledge of an adverse claim, and the extent of it, is as effective, in the law governing the subject under discussion, as actual knowledge. What will constitute adverse possession of land not susceptible of being devoted to any profitable use might not, necessarily, of agricultural land or any other susceptible of being so devoted. What would be effective for that purpose as to lands wholly or partially overflowed by water might not as to a building lot in a city. What would satisfy such purpose in respect to a marsh or swamp, not usually put by the owner to any other use than that of a hunting and fishing ground, might not as to premises of any other character. The governing questions of law, regardless of the character of the premises, are the same in every case, but the question of fact may be presented by evidence in such a great variety of ways, according to the circumstances of each particular case, that usually there is room for conflicting inferences, requiring the verdict of a jury as to where the truth lies. The true doctrine, recognized by all courts and text-writers, was declared by the United States supreme court in *Ewing v. Burnet*, 11 Pet. 41, 52, speaking by Mr. Justice Baldwin, as follows: ⁴⁴⁴ "To constitute an adverse possession there need not be a fence, building, or other improvement, and it suffices for the purpose that visible and notorious acts of ownership are exercised over the premises in controversy for the time limited by statute. So much depends upon the nature and situation of the property, the uses to which it can be applied or to which the owner or claimant may choose to apply it, that it is difficult to lay down any precise rule in all cases. But it may safely be said that where acts of ownership have been done upon the land, which from their nature indicate a notorious claim of property in it, and are continued sufficiently long with the knowledge of an adverse claimant without interruption or an adverse entry by him, such acts are

evidence of an ouster of a former owner and an actual adverse possession against him, provided the jury shall think that the property was not susceptible of a more strict or definite possession than had been so taken and held. Neither actual occupation, cultivation, nor residence are necessary where the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership such as he would exercise over property which he claimed in his own right and he would not exercise over property which he did not claim."

We should remark in passing, lest the above declaration appear to conflict with section 4214, that the facts that gave rise thereto indicate clearly that the term "improvement" was used in the restricted sense of some profitable use or physical change increasing the value of the premises, instead of in the broad sense of devoted to any use for which the premises are adapted, the sense in which the term "usually improved" is used in our statute; and that the words "actual occupation" were used in the restricted sense of appropriated by the location of some structure thereon, instead of the broad sense of any use constituting actual possession and appropriation for any purpose the land is adapted to, the sense in which the term "occupied" is used in section 4213 as construed by section 4214.

In the instant case there is some evidence that the premises ⁴⁴⁵ in controversy were subjected for the requisite length of time to the use which they were best adapted to, and a usual use, and that the acts in that regard were notorious. How, then, can we say as a matter of law that the essentials of adverse possession did not characterize Muza's conduct? It is not difficult to say generally what, as a matter of law, constitutes adverse possession; but what will evidence the necessary facts, so as to warrant saying that they exist in any given case, is quite another matter. The question of adverse possession is one "compounded of law and fact, and every case in which it is involved must be determined by its own circumstances. What is adverse possession is one thing in a populous country, and another thing in a sparsely settled one, and still a different thing in a city or village": *Draper v. Shoot*, 25 Mo. 197, 69 Am. Dec. 462. In *Sauers v. Giddings*, 90 Mich. 50, 51 N. W. 265, there was no color of title. The adverse claimant used the premises yearly as a hay meadow and for grazing purposes, and he planted some trees thereon. On such facts it was held that, whether they indicated the legal requisites of adverse possession as a fact was a jury question. In *Clark v.*

Potter, 32 Ohio St. 64, discussing the same subject it was said: "As the character of the possession depends on the nature and situation of the property, and the use to which it can be applied or to which the owner may choose to apply it, it is evident that resort must be had to the usual and ordinary conduct of owners of such land to determine if it is sufficient. If the possession comports with ordinary management of similar lands by their owners, it furnishes sufficient evidence of adverse possession."

A large number of cases might be cited to support the views above expressed. It is believed that they are so elementary that further reference to authorities is unnecessary. They lead to this: Occupancy of land necessary to adverse possession under section 4213 of the Statutes of 1898, need only be such actual possession as the subject of it is adapted to under the ⁴⁴⁶ circumstances of the particular case and such as is reasonably sufficient to attract the attention of the true owner and put him on inquiry as to the nature and extent of the invasion of his rights. If an inclosure of itself is relied upon to establish occupancy, it must be of a substantial character in the sense of being appropriate and effective to reasonably fit the premises for some use to which they are adapted. If an improvement of the premises is relied upon, any actual visible use to which similar premises are usually devoted may be sufficient, whether the result be to increase or decrease the same in value, or destroy the natural value entirely. Occupancy for a burial lot is as effective as occupancy for the purposes of a costly structure. An inclosure having no purpose of physical exclusion of outside interferences—a mere furrow turned with a plow around the land (*Sage v. Morosick*, 69 Minn. 167, 71 N. W. 930), or a line marked by cutting away the brush (*Worthley v. Burbanks*, 146 Ind. 534, 45 N. E. 779), or a fence opened so as to admit outside disturbers (*Sauers v. Giddings*, 90 Mich. 50, 51 N. W. 265)—may be sufficient, under the circumstances, to indicate, as a matter of fact, the boundaries of the adverse claim; and such boundaries may be evidenced satisfactorily to a jury by any means reasonably calculated to clearly suggest the same or suggest inquiry in regard thereto that would probably readily and clearly lead to a discovery of the truth. It is not necessary that such indications be sufficient to evidence constantly, by mere observation and without inquiry, the precise extent of an apparent hostile occupancy. If the claimant "raises his flag and keeps it up," so to speak, sufficiently to attract the attention of the true owner

to the situation, in view of the circumstances of the invasion, as a hostile claim of title, knowledge of such owner may be presumed as a fact, on the general principle that what a person ought to know under the circumstances may be held to be within his knowledge regardless of the actual fact: Sedgwick & Waite on ⁴⁴⁷ Trial of Title to Land, sec. 735; Lampman v. Van Alstyne, 94 Wis. 417, 69 N. W. 171. In discussing this subject in Cobb v. Davenport, 32 N. J. L. 369, it was in effect said that the title to premises may be obtained by continuous, exclusive, notorious, hostile appropriation thereof for the mere purpose of hunting, hawking, or fishing.

What has been said, either by direct reference or general treatment, answers the various reasons given by respondent's counsel why there should be a rehearing in this case. The difficulties with sustaining the conclusion reached by the trial court seem the same now as before. We think there was error in overlooking the fact that on the evidence defendants' right to recover did not rest wholly on the defense of adverse possession; that there was error in assuming that there was an entire absence of evidence tending to establish some of the necessary elements of adverse possession; that due consideration was not given to the character of the premises in determining whether such facts might reasonably be found by the jury to exist. Further, we think that it was overlooked that it was not essential to the defense of adverse possession to produce evidence tending to show that Muza was adversely possessed of the whole of Jones island, or to show the exact boundaries of his adverse possession. It was sufficient to carry the case to the jury on the point under discussion, to produce evidence tending to show that he, for the requisite length of time, adversely appropriated territory, including the locus in quo, to a use to which it was adapted, under such circumstances that the owner, as a reasonably prudent person, ought to have been apprised of it. The question is, Can any sensible person reasonably say from the evidence that Muza's conduct was characterized by all the elements necessary to adverse possession of the premises in question? He testified, without objection, that he took possession of such premises in 1872, and retained such possession till he surrendered the same to Bilot; that ⁴⁴⁸ no one disturbed his right; that he made no use of the land because it was marsh. In saying he made no use of the land he evidently meant that he made no use thereof as dry land; for he said almost in the same connection that he used the premises in his business as a fisherman and trapper, as he did all the territory

claimed by him. Further, he said he prohibited any person, other than those who lived on the island, from entering the territory, including Bilot's location. Once, in speaking of the use made of the premises he said "we," as if the use by him and the other settlers was in common. At another he used the pronoun "I," and indicated that he exercised authority, as an owner naturally would, to say who should and who should not enjoy the premises for fishing and trapping. Here, in the mind of the trial court, was the weakest point in the evidence. We can indorse that. It must be admitted that the truth of the matter would be very hard for anyone to determine, but that does not justify the direction of the verdict. In view of the nature of the premises, the fact that they were in the immediate vicinity of a populous district where a hostile interference therewith would be quite likely to attract attention and become notorious, that there was some evidence that the premises were devoted to the very purpose for which they were best adapted, hunting and fishing—not occasionally, but as such business is ordinarily carried on—some evidence that Muza assumed to have rightful dominion over the premises; that he resided thereon in the vicinity of the particular lot in question; that he enforced his claim of title as an actual owner would, by prohibiting any person from entering the territory to use the same for any purpose; that no other person pretended to exercise any such authority; that his claim of title was submitted to by everybody; that every person, from 1872 down till Bilot secured his location, who settled on the territory adversely claimed, did so by acknowledging Muza's title, by obtaining of him the ⁴⁴⁹ right to locate, and taking the particular parcel designated by him—could a jury, under proper instructions, reasonably say that the elements of adverse possession were all established? Counsel for respondent have given us no reason which, when analyzed and tested by the principles we have discussed, seems to justify us in answering that question any differently than we did before.

By the Court. The motion for a rehearing is denied.

SUBMERGED LANDS OF NAVIGABLE LAKES belong to the state in trust for the people for public use, and the state cannot change the condition of the title to the detriment or abdication of such trust: *Pewaukee v. Savoy*, 103 Wis. 271, 74 Am. St. Rep. 859, 79 N. W. 436. The legislature cannot make such lands the subject of private ownership: *Priewe v. Wisconsin State Land etc. Co.*, 103 Wis. 537, 74 Am. St. Rep. 904, 79 N. W. 980.

A RIPARIAN PATENTEE TAKES THE FEE only to the edge of the water of a navigable lake: *Lamprey v. State*, 52 Minn. 181, 38 Am. St. Rep. 541, 53 N. W. 1139. See, too, *Noyes v. Collins*, 92 Iowa, 506, 54 Am. St. Rep. 571, 61 N. W. 250.

ADVERSE POSSESSION.—The essential elements of adverse possession are discussed in the note to *De Frieze v. Quint*, 28 Am. St. Rep. 158-162. Title by adverse possession cannot be acquired against a state, unless it had submitted itself to the operation of the statute of limitations: See the monographic note to *Schneider v. Hutchinson*, 76 Am. St. Rep. 488. And a prescriptive title to land covered by tide water cannot be acquired, when the title is vested in the state and it is incompetent to make a grant thereof: *Sollers v. Sollers*, 77 Md. 148, 30 Am. St. Rep. 404, 26 Atl. 188.

BARTLETT v. COLLINS.

[109 Wis. 477, 85 N. W. 703.]

CONTRACTS—CONFLICT OF LAWS—WHAT GOVERNS. When a personal contract is to be partly performed in the state where made, and partly in another state, the law of the former prevails, unless there is manifested a clear, mutual intention to the contrary.

CONTRACTS—CONFLICT OF LAWS—PLACE WHERE MADE GOVERNS, WHEN.—A brokerage contract, made in the state of Wisconsin, whereby one of the parties employs the other, a broker, to sell wheat for him in Chicago, and agrees to pay commissions for such service, and to indemnify the broker against loss, is a Wisconsin contract and is governed by the law of that state.

CONTRACTS—WHAT WILL NOT BE HELD VALID.—The courts of no state will hold valid any contract which is injurious to the public rights of its people, offends their morals, contravenes their policy, or violates a public law.

SALES ON BOARDS OF TRADE—SUBMISSION TO RULES.—A person who authorizes a broker to make a sale for him on a board of trade impliedly submits himself to the lawful rules of the organization.

INSTRUCTIONS—WHEN ERRONEOUS—SPECIAL VERDICT—GENERAL VERDICT.—When a case is submitted to a jury for a special verdict, it is error to give instructions applicable only to a general verdict.

SALE AND DELIVERY OF WHEAT—TIME CONTRACT—GAMBLING TRANSACTION—BURDEN OF PROOF.—A party who claims a right under a time contract for the sale and delivery of wheat must make it affirmatively and satisfactorily appear that the contract was made with an actual view to the delivery and receipt of the grain, and not as a cover for a gambling transaction.

SALE AND DELIVERY OF WHEAT—TIME CONTRACT—GAMBLING TRANSACTION—BURDEN OF PROOF—ERRO-

NEOUS INSTRUCTION.—When a party claims a right under a time contract for the sale and delivery of wheat, it is error to instruct the jury that the burden of proof is upon the defendant to show that both parties intended the transaction to be a gambling or wagering contract, and that, unless he does so, the defense that it was a gambling transaction fails.

Action on a brokerage contract. On July 30, 1897, the defendant, Collins, directed the plaintiffs, Bartlett and another, to sell for him one thousand bushels of December wheat, Chicago delivery; and on August 6, 1897, he gave a like direction to sell another one thousand bushels, of the same delivery. The plaintiffs made both sales upon the Chicago Board of Trade, through their Chicago agents. No wheat was actually delivered on either of these sales. The price of wheat advanced, and the plaintiffs demanded margins, but as they were not kept good, the plaintiffs, on August 19, 1897, bought in two thousand bushels of December wheat, at an advanced price, and closed the transaction. No wheat was delivered upon this purchase. The defendant set up a general denial, and further claimed that the whole transaction was a gambling transaction, and that there was no intent, either on the part of himself or of the plaintiffs, to deliver a single bushel of wheat. The laws of the state of Illinois upon the subject were not put in evidence. A special verdict was returned, in which it was found that both the plaintiffs and the defendant in good faith intended and expected an actual delivery of wheat under the two sales, and the jury assessed the plaintiff's damages. Judgment was rendered in accordance with the verdict and the defendant appealed.

M. C. Mead, for the appellant.

Moe & Hansen and Otto Hansen, for the respondents.

480 WINSLOW, J. This is an action by brokers to recover of their principal their commissions and moneys advanced by them in selling grain for the principal. Both brokers and principal reside in this state, and the verbal order or commission given by the principal was given in this state, and any liability resulting from the contract on the part of the principal was evidently to be discharged in this state. It was contemplated, however, by both parties, that the transaction in grain, whether a real one or only a speculative one, should take place in Chicago. This is certain, because the plaintiffs so testify, and the defendant by his answer alleges that the intention was

to wager in the market price of wheat at the Chamber of Commerce in Chicago.

The question whether this contract was an Illinois contract or a Wisconsin contract is an important one in the case, but it has received little attention in the briefs, although the plaintiffs claim that a verdict should have been directed in their favor, because the sale of the wheat was to have been made, and in fact was made, in Chicago, and the laws of Illinois with respect to gambling transactions were not introduced in evidence. It does not clearly appear what view the trial ⁴⁸¹ judge took of the question, although he instructed the jury, in accordance with the law of this state, in effect, that if both parties intended the transaction to be a mere wagering contract on the price of wheat, without intention to deliver the wheat, but simply to settle by payment or receipt of differences, then the contract was void: Stats. 1898, sec. 2319a; *Wall v. Schneider*, 59 Wis. 352, 48 Am. Rep. 520, 18 N. W. 443. Whether this instruction was based on the idea that the contract was a Wisconsin contract and governed by Wisconsin law, or that, if it was an Illinois contract, then that the law of Illinois would be presumed, in the absence of proof, to be the same as the law of Wisconsin, is not apparent. If it was an Illinois contract, it would seem at least extremely doubtful whether any presumption would be entertained that the law of Illinois was the same as the law of Wisconsin on the subject. It has been held by this court (*Hull v. Augustine*, 23 Wis. 383) that such a presumption will not be indulged as to a statute imposing a penalty or a forfeiture, as in the case of usury laws. But, however this may be, we are of the opinion that the contract between plaintiffs and defendant was a Wisconsin contract, though the sale of grain was to be made in Chicago.

The question as to what law is to govern a contract is not always an easy one to decide. As a general rule, the construction and validity of a purely personal contract depend on the law of the place where made: *Story on Conflict of Laws*, sec. 272. If, however, the contract is made in one place, to be performed in another, then, as a general rule, the place of payment or performance is the place of the contract: 2 *Parsons on Contracts*, 8th ed., 583; *Newman v. Kershaw*, 10 Wis. 333. This rule is founded on the idea that, in making a personal contract to be fully performed in another state, the parties must have had the law of that other state in view: *Shores Lumber Co. v. Stitt*, 102 Wis. 450, 78 N. W. 562. But if the

contract is to be partly performed where made and partly ⁴⁸² in other countries or states, the law of the place where it is made will still govern, unless a clear mutual intention is manifested that it shall be governed by the law of some other country: *Liverpool etc. Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. Rep. 469. Thus, it was held in *Morgan v. New Orleans etc. R. Co.*, 2 Wood, 244, Fed. Cas. 9804, that, where a contract was made in one state to be partly performed there and partly performed in several other states, the contract, so far as it is personal in its nature, was to be governed by the law of the state where it was made. In the present case, the contract in question is the brokerage contract by which the defendant employed the plaintiffs to sell wheat for him in Chicago, and agreed to pay the plaintiffs their commissions for such service and indemnify them against loss. Both parties lived in Wisconsin, and the contract was made here. It is true that one act under the contract was to take place in Illinois, but all other acts, including the payment by the principal of all obligations incurred to his agents, were manifestly to take place in Wisconsin. Under the rules stated, it seems certain that it should be held to be governed by the law of Wisconsin.

But even were it held to be an Illinois contract, it is not seen how the result would be different. It is a universal principle that the courts of no state will hold valid any contract which is injurious to the public rights of its people, offends their morals, contravenes their policy, or violates a public law: 2 Kent's Commentaries, 14th ed., 458, and cases cited in note "d." So, in either event, if the alleged sale of the grain was in fact no sale, but only a gambling transaction, and so intended by both parties, then the contract before us can be the foundation of no rights in our courts.

Certain rules of the Chicago Board of Trade were received in evidence against defendant's objection, and this ruling is now assigned as error. It is unnecessary to recite the rules at length, but it is sufficient to say that they purport ⁴⁸³ to give to members of the board, whether buyers or sellers, the right to demand of the other party to such sale or purchase the deposit of ten per cent as security, and further security from time to time as the market price of the commodity sold varies, and also the right of resale or repurchase in case of failure to deposit the security as demanded. It is sufficient to say with regard to this ruling that we think sufficient foundation was laid for the reception of the evidence. The plaintiffs, by their

agents, offered testimony to show that the understanding was that the sale was to be made on the Chicago Board of Trade. The answer of the defendant, while claiming that the transaction was intended to be a gambling transaction, specifically alleges that it was to be a wager on prices of wheat at the Chicago Chamber of Commerce, which, we suppose, refers to the same institution as the Board of Trade. It is entirely clear that if the trade, whether real or speculative, was authorized to be made on the Board of Trade, it was intended to be made pursuant to the rules of such board. The party who authorizes such a transaction to be made under the auspices of a particular organization, like a board of trade, impliedly submits himself to the lawful rules of the organization.

The court charged the jury, in effect, that the defendant had the burden of proof to show by the greater weight of evidence that both parties intended the transaction to be a gambling or wagering contract, and unless he did so, the defense failed; and to this instruction the defendant excepted.

The instruction was erroneous for two reasons: 1. It was an instruction applicable only to a general verdict, and the case was submitted to the jury upon a special verdict; 2. It is contrary to the rule laid down in *Barnard v. Backhaus*, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595. In that case it was held that, to uphold such a contract (i. e., a time contract for the sale and ⁴⁸⁴ delivery of grain upon a board of trade), it must affirmatively and satisfactorily appear that it was made with an actual view to the delivery and receipt of the grain, and not as a cover for a gambling transaction. This rule has not been departed from, so far as we can ascertain, in this court. It is not, in our judgment, unreasonable. It is based on the well-known fact that a very large majority of the transactions on such boards are not real transactions, but simply betting on future prices. The reasons for the rule are closely analogous to those which sustain the well-known rule that where voluntary transfers of property are made by aged persons to one occupying a position of trust and confidence, under circumstances of secrecy, the burden is upon the grantee to show that the transaction was free from fraud: *Doyle v. Welsh*, 100 Wis. 24, 75 N. W. 400. We are aware that many courts do not approve this rule, but it has been definitely approved by respectable courts: *Sprague v. Warren*, 26 Neb. 326, 41 N. W. 1113; *Cobb v. Prell*, 15 Fed. 774; *Wheeler v. McDermid*, 36 Ill. App. 179.

It has been suggested that the statute (Stats. 1898, sec.

2319a), which was passed after the decision in *Barnard v. Backhaus*, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595, has changed the rule, but we have discovered no words in that statute which indicate an intention to change the rule of evidence. It would have been very easy to express such intention in unmistakable terms if it existed.

For the error in this instruction there must be a new trial. It does not seem necessary to discuss other errors alleged.

By the Court. Judgment reversed, and action remanded for a new trial.

CASSODAY, C. J., CONCURRED in the reversal of the judgment, "but solely on the ground that an instruction applicable to a general verdict was given, whereas the case was submitted to the jury on a special verdict, contrary to the rule as held in *Ward v. Chicago etc. Ry. Co.*, 102 Wis. 215, 78 N. W. 442, and subsequent cases." He could not concur in the proposition that the trial court committed an error in charging the jury as it did respecting the burden of proof. He said it was "conceded in the opinion filed [citing *Wall v. Schneider*, 59 Wis. 352, 48 Am. Rep. 520, 18 N. W. 443], that the contracts were valid, unless both parties intended the transactions to be mere wagering contracts on the price of wheat, without intending to deliver the same, but simply to adjust the differences by payments or receipts." He spoke of the Wisconsin statutes which not only render all wagering contracts void, but punish the offending parties and authorize the recovery back of the money paid thereon, and was of the opinion that a party who seeks to bring a given transaction with the opposite party under the condemnation of such penal statutes has the burden of proving it. After referring to authorities in support of the proposition that the burden of proof in an action on a contract is upon the party alleging that the transaction is illegal and a gambling contract, he said:

"Thus, it is held that, 'in the absence of evidence to the contrary, it will be presumed that the contract was made in good faith, with intent on the part of both parties to perform': *Bigelow v. Benedict*, 70 N. Y. 202, 26 Am. Rep. 573. To the same effect is *Story v. Salomon*, 71 N. Y. 420, 422, where it is said: 'We may guess that the parties were speculating upon the fluctuations in the price of the stock, and that the defendant was not to be required to take or deliver any stock in any case, but simply to pay differences. But a contract which can have legal interpretation and effect should not be condemned without any proof, in that way.' To the same effect, *Harris v. Tumbridge*, 83 N. Y. 93, 38 Am. Rep. 398. So it has been held in Alabama that where, 'by the terms of the contract, defendant agreed to deliver the stock,

and plaintiff agreed to accept a delivery, the contract is prima facie valid, and the defendant on whom rests the burden of proof has failed to show any understanding or intent that there should be no delivery': *Perryman v. Wolfe*, 93 Ala. 290, 9 South. 148. So, in Missouri, it is held that 'the burden of showing the invalidity of the contract rests upon the party asserting it': *Crawford v. Spencer*, 92 Mo. 498, 1 Am. St. Rep. 745, 4 S. W. 713. So, in New Jersey, it is held that 'the burden of proving that transactions relating to the purchase and sale of stocks which are in form transactions between the customer as principal and the broker as agent are wagering contracts rests on the party asserting their illegality': *Pratt v. Boody*, 55 N. J. Eq. 175, 35 Atl. 1113. To the same effect: *Beadles v. McElrath*, 85 Ky. 230, 3 S. W. 152. So, it has been held in Illinois that 'where the maker of a promissory note seeks to avoid the same on the ground that its consideration was illegal, the burden of proof is upon him to show the fact by a clear preponderance of the evidence': *Pixley v. Boynton*, 79 Ill. 351. That case related to a transaction on the board of trade. To the same effect is *Scanlon v. Warren*, 169 Ill. 142, 48 N. E. 410. See, also, *Gaw v. Bennett*, 153 Pa. St. 247, 34 Am. St. Rep. 699, 25 Atl. 1114. Thus, in Minnesota it is held that 'the burden of establishing the illegality of such transactions rests upon the party who asserts it': *Mohr v. Miesen*, 47 Minn. 228, 49 N. W. 862. See, also, *Roundtree v. Smith*, 108 U. S. 269, 2 Sup. Ct. Rep. 630; *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. Rep. 160; *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. Rep. 950. In these cases it is held by the highest court in this country to be 'well settled that the burden of proof is upon the party who seeks to impeach such transactions by showing affirmatively their illegality.' In my judgment, there is no well-considered case holding a contrary rule."

The learned chief justice then commented upon *Barnard v. Backhaus*, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595, for the purpose of showing that no inference should be drawn from that case that a contract for the sale and future delivery of grain, for a price certain, is presumptively a wagering contract. He conceded that, if there was no intention of delivering and receiving the grain, but merely to settle the whole thing by the payment of differences, the transaction would be a gambling contract, but contended that it was left for the party alleging such gambling contract to prove such facts. Neither did he believe that the court in *Wall v. Schneider*, 59 Wis. 352, 48 Am. Rep. 520, 18 N. W. 443, had held that an executory contract for future delivery was presumptively a gambling contract. "Such contracts," he said, "are constantly being made in respect to all kinds of commodities and in all lines of business. I am unwilling to presume that such contracts are void merely because they relate to transactions upon

some board of trade. We may have a suspicion that many of such transactions are entered into without any intent on the part of either party that the commodity contracted for should actually be delivered; and yet all must admit that there are legitimate transactions upon the boards of trade every month, if not every week, amounting to millions. Certainly, there is no good ground for presuming that all parties to such transactions are outlaws, nor that the burden of proof should be upon any to prove their innocence. The law is no respecter of persons, and in my judgment the law when applied to a given transaction upon the board of trade is the same as when applied to a like transaction occurring elsewhere." Dodge, J., concurred in these views.

CONFLICT OF LAWS.—IF A CONTRACT IS made in a state, to be partly performed there, its validity is to be determined by the laws of that state: *Hudson v. Northern Pac. Ry. Co.*, 92 Iowa, 231, 54 Am. St. Rep. 550, 60 N. W. 608; and any stipulation which is invalid in the state where it is entered into is invalid everywhere: *Illinois Cent. R. R. Co. v. Beebe*, 174 Ill. 13, 66 Am. St. Rep. 253, 50 N. E. 1019.

CONFLICT OF LAWS.—CONTRACTS FOR SPECULATING upon margins made where they are presumed to be valid cannot be enforced in another state where they are unlawful: See the monographic note to *Gist v. Western Union Tel. Co.*, 55 Am. St. Rep. 775. But see *Peet v. Hatcher*, 112 Ala. 514, 57 Am. St. Rep. 45, 21 South. 711.

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See Constitutional Law, 28-31.

ADVERSE POSSESSION.

1. **ADVERSE POSSESSION.—COLOR OF TITLE.** In order to constitute adverse possession under the statute of limitations, must be based upon a paper title. (*Lower Latham Ditch Co. v. Louden Irr. etc. Co.*, 80.)

2. **ADVERSE POSSESSION — OCCUPATION UNDER A LICENSE.**—Adverse possession which will ripen into a title must be with an intention to appropriate and hold as owner, to the exclusion of everyone else. Hence one who continues to hold land under a license from another, who has conveyed it, though without the knowledge of the licensee, cannot acquire title by adverse possession as against the grantee. (*Bond v. O'Gara*, 265.)

3. **ADVERSE POSSESSION—BED OF WATERS, WHEN SUBJECT TO LAW OF.**—When land is part of the bed of navigable waters of such a character that a qualified title thereto passes to the owner of the shore as an incident thereof, it is subject to the law of adverse possession. (*Illinois Steel Co. v. Bilot*, 905.)

4. **ADVERSE POSSESSION OF LAND COVERED BY WATER IS NOT IMPOSSIBLE.** If such land is the subject of private ownership, adverse possession thereof may be acquired by any means which actually and notoriously exclude the true owner therefrom, effectually dispossessing him thereof. Other means than physical exclusion by residence thereon, or by inclosing the same will accomplish it. (*Illinois Steel Co. v. Bilot*, 905.)

5. **OCCUPANCY OF LAND NECESSARY TO ADVERSE POSSESSION** need only be such actual possession as the subject of it is adapted to under the circumstances of the particular case and such as is reasonably sufficient to attract the attention of the true owner, and put him on inquiry as to the nature and extent of the invasion of his rights. (*Illinois Steel Co. v. Bilot*, 905.)

6. **ADVERSE POSSESSION — INCLOSURE — REQUISITE CHARACTER OF.**—If an inclosure of land is, of itself, relied upon to establish an occupancy thereof necessary to adverse possession, it must be of a substantial character in the sense of being appropriate and effective to reasonably fit the premises for some use to which they are adapted. (*Illinois Steel Co. v. Bilot*, 905.)

7. **ADVERSE POSSESSION—IMPROVEMENT—WHAT SUFFICIENT.**—If an improvement of premises is relied upon to establish occupancy of land necessary to adverse possession, any actual, visible use to which similar premises are usually devoted may be

sufficient, whether the result be to increase or decrease the same in value, or destroy the natural value entirely. (Illinois Steel Co. v. Bilot, 905.)

8. ADVERSE POSSESSION—WHAT HOSTILE USE IS SUFFICIENT.—It is not essential to adverse possession that there should be such an actual occupancy of premises as to indicate, at every instant, by mere observation, the extent of the hostile use. It is sufficient if there is such a continuous, exclusive, hostile use as, in the judgment of the jury, under all the circumstances, will notify the true owner, actually or constructively, of the invasion of his rights and the actual extent thereof. (Illinois Steel Co. v. Bilot, 905.)

9. ADVERSE POSSESSION FOR THE PURPOSE OF HUNTING AND FISHING—JURY QUESTION.—It should be left to a jury, under proper instructions, to say whether a continued, notorious use of premises, covered by water, for the purpose of hunting and fishing, coupled with other circumstances, constituted such an adverse occupancy thereof as to dispossess the true owner. (Illinois Steel Co. v. Bilot, 905.)

10. IT IS NOT NECESSARY TO THE DEFENSE OF ADVERSE POSSESSION to produce evidence tending to show that the defendant was adversely possessed of the whole of a territory, which includes the locus in quo, or to show the exact boundaries of his adverse possession. (Illinois Steel Co. v. Bilot, 905.)

11. ADVERSE POSSESSION—LAND HELD BY THE STATE. No title can be obtained, by adverse possession for twenty years, to land held by the state in any capacity. (Illinois Steel Co. v. Bilot, 905.)

AGENCY.

PRINCIPAL AND AGENT—IMPLIED AUTHORITY OF AGENT TO EMPLOY PHYSICIAN.—The general manager and superintendent of a business corporation has no implied authority to employ and furnish medical aid and assistance to a servant of the corporation who has been injured outside the scope of his employment, and the physician cannot recover therefor from the corporation. (Chase v. Swift, 552.)

See Husband and Wife, 1; Insurance.

ALIENS.

See Mines and Mining, 17; Naturalization.

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See Chattel Mortgages, 2, 3; Deeds, 2.

APPEAL.

1. APPEAL BY ONE DEFENDANT FROM PART OF DECREE.—Under the statutes of Colorado an appeal from the county to the district court may be taken by one defendant alone from that portion of the decree which affects his interest, and it is not necessary that all the defendants should join in the appeal, or that the entire case should be appealed. (Davidson v. Jennings, 49.)

2. APPEAL — EXCEPTION TO INSTRUCTION — SUFFICIENCY.—An exception to the giving of each and every instruction

is an exception to each instruction separately, but it is insufficient as an exception to any instruction which contains a correct statement of the law, because it fails to point out that which is incorrect from that which is correct. (*Beals v. Cone*, 92.)

3. APPEAL—EVIDENCE—VERDICT.—Where there is evidence tending to prove every material issue in the case, an appellate court cannot disturb the findings of the jury. (*Beals v. Cone*, 92.)

4. APPEAL—JOINT EXCEPTION TO SEPARATE RULINGS—FUTILITY OF.—If a joint demurrer of two defendants, and a separate demurrer of one of them, are overruled, and a joint exception is taken to both rulings, no assignment of error can be predicated thereon by one of the exceptors. (*South Bend v. Turner*, 200.)

5. APPEAL—WHAT MAY BE FIRST RAISED ON, BY AN INDEPENDENT ASSIGNMENT OF ERRORS.—The total absence from the complaint of any averment essential to the cause of action, or the presence of some averment which destroys it, are objections which may be raised for the first time on appeal by an independent assignment of errors. (*South Bend v. Turner*, 200.)

6. APPEAL—OBJECTIONS TO COMPLAINT—WHAT DEEMED TO HAVE BEEN WAIVED.—Mere uncertainty, or inadequacy of averment in a complaint, such as might have been amended and cured upon motion seasonably made, is deemed, on appeal, to have been waived by a defendant who proceeded with the trial to final judgment without objection. (*South Bend v. Turner*, 200.)

7. APPEAL—ASSIGNMENT OF ERROR—FAILURE OF.—An assignment of error which challenges a complaint as a whole must fail where any paragraph of the pleading is sufficient. (*South Bend v. Turner*, 200.)

8. APPEAL—REVIEW OF COURT'S DISCRETION IN REFUSING A PHYSICAL EXAMINATION OF THE PLAINTIFF'S PERSON.—When the circumstances appearing in the record in an action for a personal injury present a reasonably clear case, justifying a physical examination of the plaintiff's person, the refusal of the defendant's motion, properly made before the trial, for such an examination, is such an abuse of discretion as authorizes the reversal of a judgment for the plaintiff. (*South Bend v. Turner*, 200.)

9. APPEAL—ANSWERS TO INTERROGATORIES—JUDGMENT ON—GENERAL RULE.—All reasonable presumptions must be indulged against the special answers and in support of the general verdict, and if the general verdict, thus aided, is not in irreconcilable conflict with the answers, it must stand. (*South Bend v. Turner*, 200.)

10. APPEAL—REVERSAL—OVERRULING OF DEMURRER.—If a demurrer to a bad paragraph of an answer is overruled, the cause will be reversed unless the record clearly shows that the ruling was harmless. (*Shirk v. Neible*, 150.)

11. APPELLATE PRACTICE—EVIDENCE TO SUPPORT FINDINGS.—If there is evidence to support findings, its weight is within the province of the trial court, and its determination cannot be disturbed on appeal. (*Strickley v. Hill*, 786.)

12. APPEAL—EVIDENCE—VERDICT WILL NOT BE DISTURBED, WHEN.—An appellate court will not weigh the evidence to determine whether or not the jury arrived at a correct verdict. It will not be disturbed where there is some substantial evidence to support it. (*Reiner v. Crawford*, 848.)

ARBITRATION.

ARBITRATION AND AWARD — AVOIDANCE — CITATION OF AUTHORITIES.—If, after final submission of a matter to arbitration, under an agreement that neither party should be represented by counsel, one of them presents to the arbitrator, *ex parte*, a list of authorities, the award should be set aside, regardless of whether the arbitrator was influenced thereby or not. (*Hewitt v. Reed City*, 309.)

See Constitutional Law, 32-36.

ASSIGNMENT FOR CREDITORS.

ASSIGNMENT FOR BENEFIT OF CREDITORS—SCHEDULE OF PREFERRED DEBTS.—An assignment for the benefit of creditors is void, where the schedule of preferred debts is affirmed before a justice of the peace who is one of the trustees in the assignment. (*Martin v. Buffalo*, 679.)

ASSOCIATIONS.

See Benefit Societies; Religious Society.

ATTACHMENT AND GARNISHMENT.

1. ATTACHMENT—GARNISHMENT—OWNER OF SAFE DEPOSIT VAULT IS SUBJECT TO.—Under a statute requiring a garnishee to answer as to any personal property of the defendant, "under his control," a bank which has rented a box in a safety deposit vault therein to the defendant is subject to garnishment, where the boxes in the vault can be opened only by two keys, one a master's key in the possession of the bank, and the other a private key, in the box renter's possession. The garnishee, in such a case, has "control" of the contents of the box, though it may be impossible for him to answer specifically as to the contents thereof, and, as the court may inquire into the contents of the box by causing the defendant to be examined as a witness, the garnishee should retain the exclusive control thereof until he is discharged by the court. (*Trowbridge v. Spinning*, 806.)

2. GARNISHMENT OF CARRIERS—DAMAGES FOR UNREASONABLE DELAY.—Property in the hands of a common carrier received for transit to a place outside the state is not subject to garnishment. The carrier must respond in damages for any loss or diminution in the value of the property caused by unreasonable delay in its transportation, by reason of the service of a garnishment in a suit between the consignor and a third person. If, in such case, the carrier has placed the property in a car on a sidetrack for transportation, and has issued a bill of lading to the shipper, the fact that the car has not been placed in a train at the time of the service of the garnishment does not excuse the carrier for unreasonable delay in forwarding the property to its destination. (*Baldwin v. Great Northern Ry. Co.*, 370.)

ATTORNEY AND CLIENT.

1. ATTORNEY AND CLIENT—CONTRACT BETWEEN, FOR FEE—WHEN PRESUMED FRAUDULENT.—If a person charged with murder employs an attorney when he is put in jail, and requests him to fix his fee, which he refuses to do until further investigation, and the attorney, after a preliminary examination and but a few days before the convening of the grand jury, upon the

insistence of his client and during the existence of the confidential relation, fixes his fee at a large amount, upon the basis of work that may have to be done, and demands a note and mortgage therefor, the law presumes the transaction to be fraudulent and the fee excessive. (*Shirk v. Neible*, 150.)

2. ATTORNEY AND CLIENT—AGENCY—CONTRACTS.—A person employed to act as agent in securing the services of attorneys cannot contract to receive a part of the fees for himself as assistant attorney. In such case, he cannot be both principal and agent, and such transaction is against public policy and void. (*In re Evans*, 794.)

3. ATTORNEY AND CLIENT—CHAMPERTY.—A stipulation in a contract between attorney and client for the payment by the attorney of the costs of the litigation is against public policy, champertous, and void. (*In re Evans*, 794.)

4. ATTORNEY AND CLIENT—CHAMPERTY—BREACH OF PROFESSIONAL DUTY.—An attorney who, in the pursuit of his profession, makes a champertous agreement which is against public policy, is guilty of a flagrant breach of professional duty. (*In re Evans*, 794.)

5. CHAMPERTY RENDERS ATTORNEYS AMENABLE to the summary jurisdiction of the court, notwithstanding it may be effective as a defense to the enforcement of a contract. (*In re Evans*, 794.)

6. CHAMPERTY—AGREEMENT TO SHARE IN PROCEEDS OF LITIGATION.—While it is permissible for a near kinsman of a poor suitor to assist him in the maintenance of his suit, such kinsman cannot do so as a speculative venture, based upon an agreement to share in the proceeds of the litigation in case the suitor should recover. (*In re Evans*, 794.)

7. ATTORNEY AND CLIENT—DERELICTION OF DUTY.—The relation of attorney and client is confidential, and the attorney, by his obligation, is bound to discharge his duties to his client with the strictest fidelity. He is amenable to the summary jurisdiction of the court for any dereliction of duty. (*In re Evans*, 794.)

8. ATTORNEY AND CLIENT—KNOWLEDGE OF DUTIES AND RIGHT TO PLEAD IGNORANCE.—An attorney is presumed to know what his duties are, and cannot plead ignorance, or that in violating a plain duty he did not intend to commit a wrong. (*In re Evans*, 794.)

9. ATTORNEY AND CLIENT—DISBARMENT—EVIDENCE. The summary proceeding in disbarment of an attorney is civil, and not criminal, but in such proceeding more than a preponderance of the evidence is required, and the guilt of the attorney must be clearly established. (*In re Evans*, 794.)

10. ATTORNEYS AT LAW—PURCHASE BY, OF MORTGAGE.—A person is not disqualified, because of his being an attorney at law, from purchasing a mortgage with the intention of foreclosing it, if not paid, where no violation of duty is disclosed. (*McKenna v. Van Blarcom*, 895.)

11. ATTORNEY AND CLIENT—COMMUNICATIONS—EVIDENCE.—A statement of a fact made by a client to his attorney in the course of the employment, concerning a matter about which he, as such attorney and in no other capacity, needed information, is a privileged communication, not admissible in evidence, even though at the time it was made it was not made for the express purpose of taking advice. (*National Bank v. Delano*, 281.)

ATTORNEY'S FEES.

See Mechanics' Liens, 8.

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See Arbitration.

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See Pledge.

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See Elections.

BANKRUPTCY.

1. **BANKRUPTCY—PROVING NOTE AGAINST ESTATE OF BANKRUPT MAKER—LIABILITY OF INDORSER.**—The omission on the part of the holder of an indorsed promissory note either to prove the note against the estate of the bankrupt maker, or to tender it to the indorser to enable him to make proof, does not release the indorser from liability. (National Bank v. Sawyer, 292.)

2. **BANKRUPTCY—RIGHT OF SURETY.**—Equity will not compel a creditor to prove his claim in bankruptcy against his principal debtor for the benefit of a surety, unless the surety himself moves in the matter and requires the creditor to act, furnishing him with suitable indemnity against the consequences of risk and delay, and against expense. (National Bank v. Sawyer, 292.)

BANKS AND BANKING.

1. **BANKS AND BANKING—CHECK ON INSOLVENT BANK AS PAYMENT.**—If a county treasurer having funds belonging to a school district delivers a check therefor to the treasurer of the school district upon a bank which is at the time a "going concern," though actually insolvent, and the treasurer accepts the check, deposits it in the bank to his own credit, and receives credit therefor on the books of the bank, the transaction is equivalent to the delivery and receipt of the money by and from the county treasurer. (Board of Education v. Robinson, 374.)

2. **BANKS—FORGED CHECKS—PAYMENT OF—RECOVERY.**—A drawee bank paying a forged check or draft to a bona fide purchaser cannot recover back the money paid. (Dedham Nat. Bank v. Everett Nat. Bank, 286.)

3. **BANKS—PAYING FORGED CHECK.**—When the holder of a check in no way contributes to the deception that the signature is genuine, the drawee bank takes the risk of paying, so far as the signature is concerned. (Dedham Nat. Bank v. Everett Nat. Bank, 286.)

BENEFIT SOCIETY.

1. **BENEFIT SOCIETIES—CHANGE IN BY-LAWS.**—A mutual benefit association cannot enter into a contract with one of its members, and, after receiving large sums upon such contract, so alter its essential terms without the consent of the member as to practically destroy its value. (Strauss v. Mutual Reserve etc. Assn., 699.)

2. **BENEFIT SOCIETIES—EXPULSION OF MEMBER—ILLEGAL ASSESSMENT—DAMAGES.**—In a suit against a mutual benefit association by a member who has been wrongfully expelled therefrom on account of having refused to pay an excessive

and invalid assessment, he is entitled to recover the amount of the premiums and dues he has paid, with interest thereon from the date of each payment. (*Strauss v. Mutual Reserve etc. Assn.*, 699.)

3. **BENEFIT SOCIETIES—POWER TO CHANGE BY-LAWS.** Whatever may be the power of a mutual association to change its by-laws, such changes must always be in furtherance of the essential objects of its creation, and not destructive of vested rights. (*Strauss v. Mutual Reserve etc. Assn.*, 699.)

4. **BENEFIT SOCIETIES—RULE OF DAMAGES.**—In an action against an insurance company upon a breach of its contract, the rule that the insured may recover as damages the amount of the premiums paid, with interest, applies as well to mutual associations as to old line insurance companies. (*Strauss v. Mutual Reserve etc. Assn.*, 699.)

5. **BENEFIT SOCIETIES—CHANGE IN BY-LAWS.**—A MERE GENERAL CONSENT on the part of one who enters a mutual benefit association that the constitution and by-laws may be amended applies only to such reasonable regulations as may be within the scope of its original design. (*Strauss v. Mutual Reserve etc. Assn.*, 699.)

6. **BENEFICIAL ASSOCIATIONS—TRUST IN FAVOR OF BENEFICIARY.**—If a member of a beneficial association desiring to make his son in law his beneficiary, which being prohibited by the articles of the association, he, with its consent, makes his niece his beneficiary, with her written agreement that upon receipt of the benefit fund she will pay it over to such son in law, she may be compelled to carry out the terms of the trust. No one but the association can contest its validity. (*Cowin v. Hurst*, 344.)

BILLS AND NOTES.

See Negotiable Instruments.

BOARD OF TRADE.

See Sales, 1-3.

BONDS.

See Insurance, 18-25; Officers; Suretyship; Venue.

BOOK-MAKING.

See Constitutional Law, 14-17.

BOULEVARDS.

See Municipal Corporations, 8-10.

BOUNDARIES.

BOUNDARIES.—A PAROL AGREEMENT long acquiesced in to settle a boundary between adjoining owners, being the result of an honest attempt to fix the true boundary according to which the parties and their predecessors have actually occupied and made improvements with reference thereto, although the time has not been sufficient to establish a bar under the statute of limitations, works an estoppel, but a recent parol agreement between persons fixing the boundaries between unpatented mining claims is void under the statute of frauds, and does not bind the government. (*Strickley v. Hill*, 786.)

BOUNTIES.

See Constitutional Law, 24-26.

BUILDING AND LOAN ASSOCIATIONS.

1. BUILDING AND LOAN ASSOCIATIONS—USURIOUS CONTRACTS.—A statute providing that premiums, fines, and interest accruing to building and loan associations organized thereunder shall not be deemed usurious cannot be invoked to uphold the usurious contract of a foreign building and loan association, if such contract would be in violation of the state laws if executed within the state. (National etc. Loan Assn. v. Burch, 311.)

2. BUILDING AND LOAN ASSOCIATIONS—PLACE OF CONTRACT—USURY.—A loan made by a building and loan association, secured by mortgage on property situated in another state, which, by the terms of the mortgage is to be paid in the state of the organization of the association, but which the parties to the transaction understand is to be paid in the state where the property is situated, must be governed by the laws of the latter state as to the payment and legality of interest. (National etc. Loan Assn. v. Burch, 311.)

See Mortgages, 2.

CARRIERS.

1. CARRIERS—EVIDENCE—DELIVERY OF GOODS.—In an action against a connecting carrier for the value of goods lost in transit, evidence that the shipper actually delivered the goods to the carrier is material and relevant. (Gwyn Harper Mfg. Co. v. Carolina Cent. R. R., 675.)

2. CARRIERS—NOTICE OF LOSS.—RESTRICTIONS in a contract of carriage of the time within which notice of loss must be given will be sustained, if reasonable. (Gwyn Harper Mfg. Co. v. Carolina Cent. R. R., 675.)

3. CARRIERS—NOTICE OF LOSS—UNREASONABLE RESTRICTION.—A stipulation in a contract of carriage that claims for loss of goods must be made within thirty days after delivery, or after due time for delivery, is unreasonable, and will not be enforced. (Gwyn Harper Mfg. Co. v. Carolina Cent. R. R., 675.)

4. CARRIERS—NOTICE—CONNECTING CARRIER.—WHERE A BILL OF LADING expressly requires that notice of loss must be given to the agent at the point of delivery, an intermediate carrier who is sued cannot complain that no notice of the loss was given to it, especially where it had full knowledge thereof. (Gwyn Harper Mfg. Co. v. Carolina Cent. R. R., 675.)

5. CARRIERS—CONNECTING—PRESUMPTION OF LOSS.—Among connecting lines of common carriers, that one in whose hands goods are found damaged is presumed to have caused the damage, and the burden is upon it to rebut the presumption. (Gwyn Harper Mfg. Co. v. Carolina Cent. R. R., 675.)

See Attachment and Garnishment; Railroads.

CHAMPERTY.

See Attorney and Client, 2-6.

CHARITABLE TRUSTS.

1. CHARITABLE TRUSTS—ADMINISTRATION OF CY PRES.—In the administration of charitable trusts under the Amer-

ican system of equity jurisprudence, the powers exercised are purely judicial, derived solely from the organic law and the statutes, including the common law. The statute of 43 Elizabeth and the doctrine of administering trusts *cy pres*, or under the prerogative of the king as *parens patriae* by sign manual, have no part or place in such administration. (*St. James' Orphan Asylum v. Shelby*, 553.)

2. CHARITABLE TRUSTS — ADMINISTRATION OF. — The doctrine of charitable trusts was a part of the common-law jurisdiction of the courts of chancery of England exercising judicial powers only, and as such has been transplanted into the courts of this country possessing common-law equity powers. In the administration and enforcement of charitable trusts, the exercise of the power of the court must be solely judicial. (*St. James' Orphan Asylum v. Shelby*, 553.)

See Wills.

CHATTEL MORTGAGES.

1. CHATTEL MORTGAGE—GROWING CROP—UNCERTAIN DESCRIPTION.—A chattel mortgage on three hundred and forty acres of corn, out of a growing crop of four hundred and twenty-five acres thereof, is void for uncertainty in description, as the mortgaged property is neither uniform in quality nor capable of identification. (*Wattles v. Cobb*, 537.)

2. CHATTEL MORTGAGE — ALTERATION — EFFECT.—The material alteration of a chattel mortgage by the mortgagee after its execution destroys the mortgage so far as it remains an executory instrument. (*Bacon v. Hooker*, 279.)

3. CHATTEL MORTGAGES — ALTERATION — RETAKING PROPERTY.—Where a mortgagee upon the breach of a condition is entitled to enter the mortgagor's premises and retake the goods, such license is executory and depends upon the continued operation of the mortgage. Therefore, if the mortgage becomes void by subsequent alteration, the mortgagee cannot enter the mortgagor's premises for the purpose of taking the mortgaged goods. (*Bacon v. Hooker*, 279.)

CHECKS.

See Negotiable Instruments.

CITIZENSHIP.

CITIZENSHIP—WHEN MUST BE SHOWN.—Citizenship, or a declaration of intention to become a citizen, must be proved in a suit in aid of a patent protest and adverse claim under section 2326 of the Revised Statutes of the United States. (*Strickley v. Hill*, 786.)

See Mines and Mining, 14-17; Naturalization.

CONFLICT OF LAWS.

1. CONFLICT OF LAWS — ACTION FOR WRONGFUL DEATH.—To give a court in Ohio jurisdiction of a case brought by an administrator of a railroad employé to recover for his death, caused by the wrongful act in another state, it must, by force of the Ohio statute, be shown that such other state allows the enforcement therein of the statute of Ohio of similar character. It is not sufficient that the courts of such other state entertain actions for wrongful killing in another state. (*Wabash R. R. Co. v. Fox*, 739.)

2. CONFLICT OF LAWS — ACTION FOR DEATH BY WRONGFUL ACT.—If a statute of another state gives to the personal representative of one killed by the wrongful act of another a cause of action to recover in all cases in which the deceased could have maintained an action had he lived, and a later statute regulates the liability of corporations, other than municipal, for personal injuries to their employes, fixes the rules of evidence governing in such cases, and provides that the decisions and statutes of other states shall not be pleaded or shown as a defense, the two statutes must be treated as in *pari materia* in deciding whether, under the statute of another state, the laws of the first-named state allow the enforcement in its courts of the statute of the other state of similar character. (*Wabash R. R. Co. v. Fox*, 739.)

3. CONFLICT OF LAWS — ACTION FOR DEATH BY WRONGFUL ACT.—By force of the difference between the statutes of Indiana and of Ohio, the courts of the latter state have no jurisdiction to entertain an action by the personal representative of an employé against a railroad company, if the injury arose from the negligence of the company in the former state and death has ensued. (*Wabash R. R. Co. v. Fox*, 739.)

See Building and Loan Associations; Contracts, 1-8; Interest; Judgments, 5.

CONSTITUTIONAL LAW.

1. CONSTITUTIONAL LAW—TITLE OF STATUTE.—Statutes must not contain provisions contrary to, or not germane to, the subject matter indicated in the title; but the body of the statute need not contain all of the provisions it might contain under its title, to save it from being unconstitutional. (*Boyer v. Grand Rapids Fire Ins. Co.*, 338.)

2. CONSTITUTIONAL LAW.—THE DISTRIBUTION OF THE POWERS OF THE STATE.—by the constitution, to the legislative, executive, and judicial departments, operates by implication as an inhibition against the imposition upon either of those powers which distinctively belong to the other. (*Zanesville v. Zanesville Tel. etc. Co.*, 725.)

3. CONSTITUTIONAL LAW—COURTS—JUDICIAL POWER, TEST OF.—The fact that a power is conferred by statute on a court to be exercised by it in the first instance in a proceeding instituted therein is itself of controlling importance, as fixing the judicial character of the power, and is conclusive in that respect, unless it is reasonably certain that the power belongs exclusively to the legislative or executive department. (*Zanesville v. Zanesville Tel. etc. Co.*, 725.)

4. CONSTITUTIONAL LAW — COURTS — POWER CONFERRED BY STATUTE.—Where a statute confers a right and authorizes application to a court for its enforcement, the proceeding upon such application is the exercise of a judicial function, although the judgment authorized is of such a nature that it can only be performed, or its execution enforced, progressively through a future period. (*Zanesville v. Zanesville Tel. etc. Co.*, 725.)

5. CONSTITUTIONAL LAW — COURTS — POWERS CONFERRED BY STATUTE.—The necessity for the existence of some tribunal authorized to hear and determine disagreements between municipalities and telephone companies, with respect to

the mode of construction of lines in the public streets, being apparent, such authority may by statute be conferred upon the probate court. (*Zanesville v. Zanesville Tel. etc. Co.*, 725.)

6. CONSTITUTIONAL LAW—CHANGE OF REMEDY.—The legislature has inherent power to enlarge, limit, alter, or repeal remedial statutes, provided contracts are not directly impaired, and a remedy is left, though less convenient and prompt, than the one so changed or repealed. (*Kirkman v. Bird*, 774.)

7. CONSTITUTIONAL LAW—CHANGE IN REMEDY.—Any change or limitation of the remedy not materially abridging the right does not impair the obligation of contracts. (*Kirkman v. Bird*, 774.)

8. CONSTITUTIONAL LAW—EXEMPTION LAWS.—A statute absolutely exempting to married men, or heads of families, their earnings for personal services rendered within the sixty days next preceding the levy of execution, by garnishment or otherwise, is reasonable and directed to the remedy, and not to the right, and does not impair the obligation of contracts entered into prior to its passage. (*Kirkman v. Bird*, 774.)

9. STATUTES—UPHOLDING CONSTITUTIONALITY OF.—Legislative acts are presumed to be valid, and they are to be upheld by the courts, not only when clearly authorized, but in all cases of doubt, and until it is made clearly to appear that they contravene some constitutional provision. (*Overshiner v. State*, 187.)

10. STATUTES—ASSAILING CONSTITUTIONALITY OF—PRACTICE.—One who assails a legislative act as unconstitutional must be able to point out the particular provision of the constitution which has been violated, and the ground upon which it has been unequivocally infringed. (*Overshiner v. State*, 187.)

11. CONSTITUTIONAL LAW—POWER TO APPOINT OFFICERS.—The exclusive right to exercise the power of appointment to office does not rest in the executive department of the government. State officers, or officers performing state functions, may be chosen, under legislative authority, by private corporations. (*Overshiner v. State*, 187.)

12. CONSTITUTIONAL LAW—POWER OF STATE DENTAL ASSOCIATION TO APPOINT EXAMINERS.—A statute regulating the practice of dentistry, which provides for the appointment of a state board of five dental examiners, one by the governor, one by the state board of health, and three by the state dental association, is not unconstitutional because of the provision which confers power upon the association to appoint three of the members. (*Overshiner v. State*, 187.)

13. CONSTITUTIONAL LAW—CLASS LEGISLATION—EXACTING A LICENSE AND BOND FROM COMMISSION MEN.—A statute requiring merchants who sell farm produce upon commission to execute a penal bond conditioned for the faithful performance of their contracts, and to pay a license fee, is unconstitutional, as being class legislation, and as an unjustifiable interference with the right of the citizen to carry on legitimate business. (*People v. Berrien Circuit Judge*, 352.)

14. CONSTITUTIONAL LAW.—“BOOK-MAKING” AND “POOL-SELLING” constitute gaming or gambling, which the state may prohibit altogether, or may regulate and control by restricting the business to certain localities, or by prohibiting it in others. (*State v. Thompson*, 468.)

15. CONSTITUTIONAL LAW—DELEGATION OF DETERMINING POWER IS NOT A DELEGATION OF LEGISLATIVE

POWER.—In regulating gambling, such as “book-making” and “pool-selling,” the state can, without violating the constitution, make a law delegating a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. The power to grant a license, vested in some particular person, is not a delegation of legislative power. (*State v. Thompson*, 468.)

16. CONSTITUTIONAL LAW—ACT CONCERNING BOOK-MAKING AND POOL-SELLING—DELEGATION OF LEGISLATIVE POWER—WHAT IS NOT.—A statute which prohibits “book-making” and “pool-selling” from being carried on, except at places mentioned in a license therefor, and which confers upon the state auditor the right to say what applicants for such a license are of good moral character, and what racecourses and fair-grounds are of good repute, and to grant licenses to such persons as he may think entitled thereto, is not unconstitutional, on the ground that it contains a delegation of legislative power. The power thus delegated is merely one to determine a fact. (*State v. Thompson*, 468.)

17. CONSTITUTIONAL LAW—ACT CONCERNING BOOK-MAKING AND POOL-SELLING—CLASS LEGISLATION—WHAT IS NOT.—A statute which declares betting on horseracing to be gambling, and which authorizes it, but prohibits the business of “book-making” and “pool-selling” at all places except those mentioned in a license therefor, the granting of which is left by the statute to the discretion of the state auditor, is not vicious class legislation, either as to persons or place, because it embraces all persons alike who choose to place themselves within its reach, and is not in conflict with section 1, article 14, of the amendments to the federal constitution, but is a legitimate exercise of the police power of the state. (*State v. Thompson*, 468.)

18. CONSTITUTIONAL LAW—LODGING-HOUSES—POLICE POWER.—A statute providing that not more than a prescribed number of persons shall sleep in the same room in any lodging-house at the same time is unconstitutional, as a discrimination against such houses and in favor of hotels, inns, and boarding-houses, and cannot be upheld as a legal exercise of the police power, designed as a sanitary measure. (*Bailey v. People*, 116.)

19. CONSTITUTIONAL LAW—REGULATIONS FOR PRESERVATION OF HEALTH.—Rights of property cannot be permitted to be invaded under the guise of police regulations for the preservation of health, when such is clearly not the object and purpose of such regulations. (*Bailey v. People*, 116.)

20. CONSTITUTIONAL LAW—RIGHT TO KEEP LODGING-HOUSE.—The right to entertain lodgers in a lodging-house and to fix by contract with them the price to be paid for such accommodation and the number who shall occupy the same room at the same time for sleeping purposes, is a constitutional liberty and also a property right. Any restriction upon or abridgment of such right deprives the citizen of both liberty and property. (*Bailey v. People*, 116.)

21. CONSTITUTIONAL LAW—DUE PROCESS OF LAW.—The constitutional provision that no person shall be deprived of liberty or property without due process of law means a public, general law, legally enacted, binding upon all members of the community under all circumstances, and not partial or private laws affecting only the rights of private individuals or classes of individuals. (*Bailey v. People*, 116.)

22. **CONSTITUTIONAL LAW—DUE PROCESS OF LAW.**—An enactment which deprives one class of persons of the right to acquire and enjoy property, or to contract with relation thereto, in the same manner as others under like conditions and circumstances are permitted to acquire and enjoy property, or contract with relation to it, is not comprehended within the true meaning of the words "due process of law." (*Bailey v. People*, 116.)

23. **CONSTITUTIONAL LAW—GUARANTY OF LIBERTY AND PROPERTY.**—A statute arbitrarily discriminating against one class in the transaction of the business of a lawful occupation, and leaving unaffected by such discriminatory enactment other persons, or classes of persons, engaged in acquiring property in a manner not distinguishable in character from that in which the class discriminated against is employed, is in contravention of the constitutional guaranties of liberty and property. (*Bailey v. People*, 116.)

24. **CONSTITUTIONAL LAW—BOUNTIES.**—A statute providing for the payment of bounties to manufacturers in the state of sugar from beets grown therein is unconstitutional as authorizing taxation for a private purpose. (*Michigan Sugar Co. v. Auditor General*, 354.)

25. **CONSTITUTIONAL LAW.—UNCONSTITUTIONAL STATUTES LACK THE FORCE OF LAW**, and are of no more saving effect to justify action under them than as though they had never been enacted. (*Michigan Sugar Co. v. Auditor General*, 354.)

26. **CONSTITUTIONAL LAW—BOUNTIES.**—If a statute providing for the payment of certain bounties is unconstitutional, a subsequent statute making an appropriation to pay such bounties as earned is also unconstitutional and cannot be enforced. (*Michigan Sugar Co. v. Auditor General*, 354.)

27. **CONSTITUTIONAL LAW—CURE OF INEBRIATES—SPECIAL LEGISLATION.**—A statute providing for the treatment and cure of inebriates by counties having a population of fifty thousand or more is unconstitutional, as being special legislation as to the affairs of counties, and as not being uniform in its operation throughout the state. Classification on the basis of population for the purpose of legislation upon the subject of the cure, at the cost of the public, of indigent inebriates is unconstitutional and void. (*Murray v. Board of County Commrs.*, 379.)

28. **CONSTITUTIONAL LAW—PURE FOOD LAWS.**—The legislature has no constitutional right to absolutely prohibit a person from selling, or offering for sale, an article for food or drink, if it is one so universally conceded to be wholesome and innocuous that the court may take judicial notice of it; but it does have a right to either regulate or prohibit such sale, if there is a dispute as to the fact of the article's wholesomeness for food or drink. (*State v. Layton*, 487.)

29. **CONSTITUTIONAL LAW—PROHIBITING USE OF ALUM IN BREAD.**—When there is a sharp conflict of testimony as to the noxious or innocuous character of alum baking-powders, a court cannot take judicial notice that these powders are a perfectly innocuous preparation, and cannot, therefore, declare that the legislature, in prohibiting the use of alum in bread, transcended its constitutional authority. (*State v. Layton*, 487.)

30. **STATUTES — UNCONSTITUTIONALITY OF—QUESTION OF FACT.**—A statute is not to be declared void, on the ground of unconstitutionality, unless the violation of the constitution is so manifest as to leave no room for reasonable doubt. Its constitutionality cannot be made to depend upon a question of fact. (*State v. Layton*, 487.)

31. STATUTES—ACT PROHIBITING THE USE OF ALUM IN ARTICLES OF FOOD OR DRINK—WHEN CONSTITUTIONAL.—An act, making it unlawful to manufacture, sell, or offer to sell, any article, compound, or preparation for the purpose of being used, or which is intended to be used, in the preparation of food, in which article, compound, or preparation "there is any arsenic, calomel, bismuth, ammonia, or alum," is not unconstitutional, though the act is obviously aimed at what is known as "alum baking-powders," where there is such a sharp conflict of testimony as to their wholesomeness or unhealthfulness that a court cannot take judicial notice that they are unwholesome or unhealthful. (*State v. Layton*, 487.)

32. CONSTITUTIONAL LAW—COURTS OF ARBITRATION.—The creation of a state court of mediation and arbitration for the amicable adjustment of differences between employers and employes in certain cases is authorized by a constitutional provision that the legislature may establish courts of conciliation, with such powers and duties as may be prescribed by law. (*Renaud v. State Court etc.*, 346.)

33. CONSTITUTIONAL LAW—OFFICE, APPOINTMENT, INSTEAD OF ELECTION.—Under a constitution authorizing the establishment of courts of conciliation, the legislature may provide for the appointment of the members of the court, instead of requiring their election by the people. (*Renaud v. State Court etc.*, 346.)

34. COURTS OF MEDIATION AND ARBITRATION DO NOT POSSESS POWER TO GRANT REHEARINGS, unless the statute creating them contains a grant of such power. (*Renaud v. State Court etc.*, 346.)

35. COURTS OF MEDIATION AND ARBITRATION.—WRIT OF MANDAMUS OR PROHIBITION MAY ISSUE to vacate or stay further proceedings under a void order for a rehearing issued by a state court of mediation and arbitration in a case already decided by it. (*Renaud v. State Court etc.*, 346.)

36. COURTS OF MEDIATION AND ARBITRATION—RIGHT OF APPEAL FROM DECISIONS OF.—Unless the statute creating a court of mediation and arbitration expressly or by plain implication provides for an appeal from its decisions, no appeal can be taken. (*Renaud v. State Court etc.*, 346.)

37. CONSTITUTIONAL LAW—VESTED RIGHT TO A PENALTY.—A plaintiff who has obtained judgment for a penalty in a justice's court, and which, though appealed from, remains unreversed, acquires a vested right of property which cannot be taken from him by the legislature. (*Dunham v. Anders*, 668.)

38. CONSTITUTIONAL LAW—MUNICIPAL ORDINANCES REGULATING MARKETS.—A municipal ordinance prohibiting private markets within a certain distance from public markets is a valid exercise of the police power. (*New Orleans v. Faber*, 232.)

39. CONSTITUTIONAL LAW.—THE REGULATION AND CONTROL OF MARKETS, public and private, for the sale of provisions and commodities, including the places and distances from one another at which they may be kept, are matters of municipal police power, and may be intrusted by the legislature to a city council, to be exercised as, in its discretion, the public health and convenience may require. (*New Orleans v. Faber*, 232.)

40. CONSTITUTIONAL LAW—MUNICIPAL ORDINANCES REGULATING MARKETS.—The fact that a municipal ordinance requires certain food commodities to be sold only in public markets, and that its effect is to compel dealers therein to go into the public markets or to go out of business, does not affect the validity of

such ordinance nor render it unconstitutional and void. (*New Orleans v. Faber*, 232.)

41. **CONSTITUTIONAL LAW—REGULATION OF MARKETS.** A city may authorize persons to build markets and collect the revenues thereof for a fixed period in consideration of their conveying the property to the city at the end of the term, and the city may exact that such markets are to be under its control and in all respects governed by regulations applicable to other markets. (*New Orleans v. Faber*, 232.)

42. **CONSTITUTIONAL LAW.—THE ESTABLISHMENT OF PUBLIC MARKETS** and the prohibition of private markets are within the legislative discretion, which cannot be inquired into by the courts unless fraud is committed, or there is a manifest invasion of private right. (*New Orleans v. Faber*, 232.)

See *Mechanics' Liens*, 1; *Taxation*, 2.

CONTEMPT.

1. **CONTEMPT — COERCION OF COURT — NEWSPAPER ARTICLES.**—Every litigant is entitled not only to a just decision, but to a decision by a court altogether free from the suspicion of having been coerced, and a newspaper article which may have a tendency to influence the decision of the court is a constructive contempt. (*State v. Bee Publishing Co.*, 531.)

2. **CONTEMPT — NEWSPAPER ARTICLES — CONTROL OF COURT.**—The press, the public, and individuals have the right to discuss, criticise, and censure the decisions of the courts, but they have no right to subject the court to any form of coercion with a view of affecting its judgment in a pending case, and such action is a constructive contempt. (*State v. Bee Publishing Co.*, 531.)

3. **CONTEMPT—NEWSPAPER ARTICLES.**—A newspaper company deliberately seeking to influence the decision of a court by the publication of articles threatening the judges thereof with public odium and reprobation in case they decide a pending case in a certain way is guilty of a constructive contempt. (*State v. Bee Publishing Co.*, 531.)

CONTRACTS.

1. **CONTRACTS—CONFLICT OF LAWS—WHAT GOVERNS.** When a personal contract is to be partly performed in the state where made, and partly in another state, the law of the former prevails, unless there is manifested a clear, mutual intention to the contrary. (*Bartlett v. Collins*, 928.)

2. **CONTRACTS — CONFLICT OF LAWS — PLACE WHERE MADE GOVERNS, WHEN.**—A brokerage contract, made in the state of Wisconsin, whereby one of the parties employs the other, a broker, to sell wheat for him in Chicago, and agrees to pay commissions for such service, and to indemnify the broker against loss, is a Wisconsin contract and is governed by the law of that state. (*Bartlett v. Collins*, 928.)

3. **CONTRACTS—WHAT WILL NOT BE HELD VALID.**—The courts of no state will hold valid any contract which is injurious to the public rights of its people, offends their morals, contravenes their policy, or violates a public law. (*Bartlett v. Collins*, 928.)

4. **CONTRACTS CONTRAVENING THE ESTABLISHED POLICY** of the state cannot be enforced in the courts thereof. (*Commonwealth Mut. Fire Ins. Co. v. Hayden*, 545.)

5. CONTRACTS — CONSTRUCTION. — TWO INSTRUMENTS EXECUTED AS PART OF THE SAME TRANSACTION and agreement, whether at the same or different times, must be taken and construed together as one instrument. (*Chicago Trust etc. Bank v. Chicago Title etc. Co.*, 138.)

6. CONTRACTS — SALE OF UNCUT TIMBER — UNCERTAINTY.—A written contract, whereby the buyer is allowed five years within which to cut and remove standing timber, the term to be computed from the time the buyer begins to manufacture the timber into lumber, is void for uncertainty. (*Manufacturing Co. v. Hobbs*, 661.)

7. CONTRACTS—SALE OF TIMBER—REASONABLE TIME. Under a contract for the purchase of uncut timber, whereby a buyer is allowed a reasonable time to cut and remove it, a delay of thirteen years before any attempt to remove is made operates as a waiver of the purchaser's rights under the contract. (*Manufacturing Co. v. Hobbs*, 661.)

8. CONTRACTS—MARRIED WOMEN—PRESUMPTION OF LAW OF SISTER STATE.—There being no evidence to the contrary, it is presumed that the contract of a married woman made in a sister state is void, as at common law. (*Terry v. Robbins*, 663.)

9. NOVATION — CONTRACT — QUESTION FOR JURY.—Whether a bond given by a mortgagor in payment of an installment of interest is intended as a novation is a question of fact, to be determined by the jury. (*Terry v. Robbins*, 663.)

CONVEYANCE.

See Deeds.

CORPORATIONS.

1. CORPORATIONS—PLEADING EXISTENCE OF.—Corporation need not in its complaint aver its corporate existence. Such averment, if made, is immaterial, and a general denial to a petition so averring does not impose upon the plaintiff the burden to prove its corporate existence. (*Brady v. National Supply Co.*, 753.)

2. CORPORATIONS—ISSUE OF CORPORATE EXISTENCE, HOW RAISED.—If defendant desires to raise the issue as to whether the plaintiff is a corporation, he must specially plead and aver by answer that the plaintiff has no corporate existence, and has no right to contract or sue as a corporation. (*Brady v. National Supply Co.*, 753.)

3. CORPORATIONS — CORPORATE EXISTENCE, WHEN MUST BE PLEADED.—If a corporation is made defendant in an action, and its charter, powers, and franchises become the foundation of such action, they must be specially pleaded in the petition, and if the corporation is a foreign one, the name of the state by which, and the substantial terms, in which, the charter, powers, and franchises were granted must appear in the petition. (*Brady v. National Supply Co.*, 753.)

4. CORPORATIONS—POWER OF OFFICER TO BORROW MONEY.—The president and general manager of a corporation who has the entire charge and control of its affairs, and who is the sole stockholder therein, has authority to make notes and borrow money thereon for the use and benefit of the corporation. (*Africa v. Duluth News Tribune Co.*, 424.)

5. CORPORATIONS—NOTE PAYABLE TO OFFICER OF.—The note of a corporation made exclusively for its benefit, by an

officer thereof, to himself as payee, is valid. (*Africa v. Duluth News Tribune Co.*, 424.)

6. **CORPORATIONS—WHEN BOUND BY ACTS OF OFFICERS.**—A public corporation is bound by the acts and conduct of its officers only when they are engaged in the duties of their office. Notice to them, to bind the corporation, must come to them in their official capacity, and while acting within the scope of their authority. An officer of a corporation not acting in his official capacity in procuring sureties for an official bond does not bind the corporation by information obtained by him while engaged in such business. (*Board of Education v. Robinson*, 374.)

7. **CORPORATIONS—DUTY TO FURNISH INFORMATION AS TO THEIR BUSINESS.**—If the state has a legal right, through its officers, to call upon corporations or companies for information as to their business, they cannot be permitted to determine for themselves whether they will answer or not, for the reason that it is not possible for them to do so. It is their duty in such cases to answer candidly, so far as reasonably possible, and to state the facts which they claim excuse them for not answering more fully. (*State v. United States Express Co.*, 366.)

8. **CORPORATIONS—JUDGMENT AGAINST STOCKHOLDER—SERVICE OF PROCESS.**—A stockholder in a corporation is concluded by a judgment against him in an action against the corporation to enforce a corporate obligation, although he is not a party to the suit as an individual, but only through representation by the corporation upon the theory that, though not personally served with process, he is before the court as an integral part of the corporation and represented by it. (*Commonwealth Mut. Fire Ins. Co. v. Hayden*, 545.)

9. **EXECUTIONS—CORPORATE PROPERTY SUBJECT TO.**—The creditors of a private corporation, although established for a public purpose, are entitled to collect their claims out of the proceeds of the property of the corporation in liquidation. (*New Orleans Auxiliary Sanitary Assn. in Liquidation*, 230.)

See Express Companies; Insurance.

COTENANCY.

See Landlord and Tenant, 4, 5.

COURTS.

COURTS — JURISDICTION — SUIT. WHAT COMPREHENDS.—The right to institute and prosecute a proceeding in a court comprehends the filing of a proper complaint, process for bringing in the proper parties, and a judicial inquiry according to the established rules of evidence and the practice of courts. (*Zanesville v. Zanesville Tel. etc. Co.*, 725.)

See Constitutional Law, 2-5.

COURTS OF ARBITRATION.

See Constitutional Law, 32-36.

COVENANTS.

1. **COVENANTS RUN ONLY** with the legal title to lands and tenements. (*Wallace v. Pereles*, 898.)

2. **COVENANTS ARE PERSONAL, WHEN.**—The covenants of a grantor of land, if he has no title and no possession, and

the grantee does not take immediate possession, are personal to the grantee, and are not transmitted to subsequent grantees by a mere conveyance of the land. (*Wallace v. Pereles*, 898.)

3. **DEEDS—COVENANT AGAINST ENCUMBRANCES—DAMAGES IN FAVOR OF PURCHASER.**—A covenant against encumbrances is personal as between the grantor and grantee, and if the deed contains a stated consideration and the covenantee conveys the land to one having no notice of the real consideration, such grantee may, after paying off the encumbrance, recover the damages sustained against the covenantor, who cannot set up the defense of set-off or other defense existing at the time of the execution of the covenant. (*Randall v. Macbeth*, 387.)

CRIMINAL LAW.

1. **CRIMINAL LAW.—AN INDICTMENT** must in all cases employ so many of the substantial words of the statute as will enable the court to see on what statute it is founded, and all other words which are essential to a complete description of the offense, or such words as are equivalent, or more than equivalent, to those used in the statute, provided they include the full signification of the statutory words, but not otherwise. (*State v. Williamson*, 780.)

2. **CRIMINAL LAW.—INDICTMENTS FOR PURELY STATUTORY OFFENSES** need only charge the defendant with all the acts within the statutory definition, substantially in the words of the statute, without further expansion. (*State v. Williamson*, 780.)

3. **CRIMINAL LAW — INDICTMENTS — EXCEPTIONS, WHETHER MUST BE NEGATIVED.**—If a statute defining an offense contains an exception in its enacting clause which is so incorporated with the language defining the offense that the ingredients thereof cannot be accurately and clearly described if the exception is omitted, an indictment founded upon the statute must allege enough to show that the accused is not within the exception. If the language clearly defining the offense is entirely separable from the exception, the indictment may omit any reference to the exception. (*State v. Williamson*, 780.)

4. **CRIMINAL LAW—INDICTMENTS—STATUTORY CRIMES.** If a statute prohibits the doing of a particular act without the authority of one or two things, the indictment must negative the existence of both. (*State v. Williamson*, 780.)

5. **CRIMINAL LAW.—REASONABLE DOUBT** is not a mere imaginary, captious, or possible doubt, but a fair doubt, based upon reason and common sense, growing out of the evidence in the case. It is such a doubt as will leave a juror's mind, after a careful examination of all of the evidence, in such a condition that he cannot say that he has an abiding conviction, to a moral certainty, of the defendant's guilt. (*State v. Williamson*, 780.)

6. **CRIMINAL LAW—RIGHT TO HOLD PRISONER.—RECITALS IN A COMMITMENT** as to mere matters of procedure, and which are no part of the judgment, do not affect or impair the right of a warden to detain a prisoner. (*Ex parte Dela*, 603.)

7. **CRIMINAL LAW — JUDGMENT — COMMITMENT. — THE TWO ESSENTIALS** to a valid judgment of conviction, and a process of commitment issued thereon, are the statement defining the punishment, and the statement of the offense for which the punishment is inflicted. (*Ex parte Dela*, 603.)

8. **CRIMINAL LAW — MURDER — STATUTE FIXING DEGREES OF.**—A statute which makes all murder committed in the

perpetration of arson, rape, robbery, or burglary murder in the first degree, does not create a new crime, but merely makes a distinction with a view of different degrees of punishment, based upon different grades of crime. (Ex parte Dela, 603.)

9. CRIMINAL LAW — MURDER — PREMEDITATION — ATTEMPT TO COMMIT OTHER FELONY.—The perpetration of, or the attempt to perpetrate, arson, rape, robbery, or burglary, during which a homicide is committed, stands in lieu of premeditation and deliberation otherwise necessary to constitute murder in the first degree. (Ex parte Dela, 603.)

10. CRIMINAL LAW—INDICTMENT FOR MURDER—CONVICTION OF RAPE.—UNDER A CONSTITUTION providing that no person shall be tried for a capital or other infamous crime except on presentment or indictment of a grand jury, a person who has been indicted and tried for murder cannot be convicted of the crime of rape. (Ex parte Dela, 603.)

11. CRIMINAL LAW.—A SENTENCE for imprisonment which states the period of its duration and the place of confinement is not void for uncertainty because it fails to fix the time for the imprisonment to commence. (Ex parte Gafford, 568.)

12. CRIMINAL LAW — SENTENCE — SECOND OFFENSE — TERM OF IMPRISONMENT.—Where a defendant is already in execution on one sentence, and a second sentence does not state that the term is to begin at the expiration of the former, the second sentence runs concurrently with the first. (Ex parte Gafford, 568.)

13. CRIMINAL LAW—JOINT SENTENCE—HABEAS CORPUS. Where a court has jurisdiction to try two or more defendants upon a joint indictment for the same public offense, a joint sentence of such defendants is not void, however erroneous it may be; and whether erroneous or not cannot be determined on habeas corpus. (Ex parte Gafford, 568.)

See Former Jeopardy.

CROPS.

See Chattel Mortgages.

DEATH.

See Conflict of Laws; Executors and Administrators, 5; Negligence, 6; Physicians, 2.

DEDICATION.

See Municipal Corporations, 5.

DEEDS.

1. DEEDS—MAP OR PLAT — REGISTRATION.—A map or plat, referred to in a deed, becomes a part of the deed as if it were written therein, and is not required to be registered. (Collins v. Asheville Land Co., 720.)

2. DEEDS—ALTERATION—EFFECT.—So far as a deed passes an estate and is not merely executory, its executed effect is not disturbed by a subsequent alteration. (Bacon v. Hooker, 279.)

See Covenants; Husband and Wife, 3, 4.

DENTAL ASSOCIATION.

See Constitutional Law, 12.

DIVORCE.

See Marriage and Divorce.

EASEMENTS.

See Injunctions, 2.

EJECTMENT.

1. EJECTMENT CANNOT BE MAINTAINED TO RECOVER THE BED OF A LAKE, though the plaintiff establishes ownership of the natural shore. (*Illinois Steel Co. v. Bilot*, 905.)

2. IN EJECTMENT, THE PLAINTIFF MUST RECOVER ON THE STRENGTH OF HIS OWN TITLE, not on the weakness of his adversary's title. (*Illinois Steel Co. v. Bilot*, 905.)

3. EJECTMENT FOR SUBMERGED LANDS—WHEN A VERDICT FOR THE PLAINTIFF SHOULD NOT BE DIRECTED.—In ejectment for submerged land included in a government survey and patent, where there is evidence that the locus in quo is a part of the bed of a lake, or that it is appurtenant to the bank of a river, the court should refuse a motion to direct a verdict in favor of the plaintiff, and leave the cause to the jury, under proper instructions, although the plaintiff's paper title from the government is prima facie perfect, for if the jury find that the locus in quo is in fact a part of the bed of a lake, this will overthrow the plaintiff's title, and if it is appurtenant to the bank of a river, they may find such an adverse possession as to take the title thereto from the holder of the paper title. (*Illinois Steel Co. v. Bilot*, 905.)

ELECTIONS.

1. ELECTIONS—IMPROPER APPOINTMENT OF INSPECTORS.—A statute providing that inspectors and clerks of election shall not be appointed from the same political party is directory, and a mere noncompliance therewith, not resulting in fraud, is not sufficient ground for rejecting the vote of the county or precinct. (*State v. Sadler*, 573.)

2. ELECTIONS.—MISCONDUCT ON THE PART OF INSPECTORS, ELECTORS, AND BYSTANDERS is not sufficient ground for rejecting the vote of a precinct, where the person elected neither knew of, nor participated in, the misconduct, and it is not shown that any elector who voted for the person elected either participated in, or was influenced by, such misconduct, and that no elector was prevented from properly voting. (*State v. Sadler*, 573.)

3. ELECTIONS—VALIDITY OF.—ANY IRREGULARITY in conducting an election which does not deprive an elector of the right to vote, nor admit a disqualified person to vote, nor cast uncertainty on the result, and which has not been occasioned by the agency of the party whose right to office is in contest, does not vitiate the election. (*State v. Sadler*, 573.)

4. ELECTIONS—SOLDIERS' VOTE—ABSENCE FROM THE STATE.—An election ordinance in pursuance of an act of Congress providing that a constitution shall be submitted to the people of the territory of Nevada including those in the army of the United States both within and beyond the boundaries of the territory, does not apply to future elections held under the state government. (*State v. Sadler*, 573.)

5. ELECTIONS—SOLDIERS' VOTE.—In the absence of a statute regulating the manner of voting or holding elections by persons who may be in the military or naval service of the United States,

beyond the boundaries of the state, no such election can be legally held. (State v. Sadler, 573.)

6. ELECTIONS — MUNICIPAL CHARTER—COUNCILMEN.—Under a city charter, one section of which provides that councilmen shall be chosen by the qualified electors, no two councilmen to be residents of the same ward, and a later section provides that one councilman shall be elected in each ward, who shall be a resident of such ward, each councilman is chosen solely by the electors of his ward. (State v. Sadler, 573.)

7. ELECTIONS — BALLOTS — UNAUTHORIZED NAMES — FRAUD.—Ballots, which contain the names of persons nominated for office which do not belong on it, are not invalid as to candidates whose names are properly thereon, in the absence of any showing of fraud or corruption. (State v. Sadler, 573.)

8. ELECTIONS — VACANCY IN OFFICE—STATE OFFICER ACCEPTING FEDERAL POSITION.—The acceptance by a state officer of a United States office is a resignation of the state office, and creates a vacancy in such office. (State v. Sadler, 573.)

9. ELECTIONS—VACANCY—PROCLAMATION BY GOVERNOR.—UNDER A STATUTE providing that when a vacancy occurs in the office of a member of the legislature, and the legislature is to convene before the next general election, the governor shall issue a writ of election to fill such vacancy, no writ of election is required to enable the people to fill a vacancy, where the legislature is not to convene before the next general election. (State v. Sadler, 573.)

10. ELECTIONS—REGISTRATION—ILLNESS OF REGISTRY AGENT.—The registration of voters by one not the regular registry agent, at the request, and by reason of the illness, of such agent, is without authority of law, where the statute makes no provision for the registration of voters in case of the illness of the registry agent. (State v. Sadler, 573.)

11. ELECTIONS—IRREGULAR REGISTRATION—VALIDITY OF BALLOT.—The ballot of a duly qualified elector whose name is on the official register should not be rejected on account of irregular or illegal registration. (State v. Sadler, 573.)

12. ELECTIONS—RIGHT TO VOTE.—INSPECTORS OF ELECTIONS are mere ministerial officers, and have no right to refuse to receive the vote of one whose name is on the official register, except upon his failure to prove his identity as the person who was registered in that name. (State v. Sadler, 573.)

13. ELECTIONS — REGISTRATION — PRECINCTS — TRANSFER.—In a county where there are no legally established election precincts, a properly registered elector may take his registration certificate and have his name registered at any other polling place in the same county at any time before the delivery of the register to the election inspectors. (State v. Sadler, 573.)

14. ELECTIONS—BALLOTS—IDENTIFYING MARKS.—A ballot is not void and will be counted when it appears therefrom that the elector has attempted to make a cross after or following the names to be voted for, though the lines are rough or irregular, or resemble the letters "Y," "T," or "V"; neither will a ballot be rejected because it contains marks occasioned by accident, or made by election officers after the ballot had been cast by the voter. (State v. Sadler, 573.)

15. ELECTIONS — BALLOTS — ILLEGAL IDENTIFYING MARKS.—A ballot will be rejected when it appears therefrom that the elector has made no attempt to mark the ballot with the re-

quired cross at the proper places, but has made marks of a wholly different character, such as the letters "S," "W," "N," or "O," or horizontal or perpendicular lines, or where the ballot contains on its face other marks, scratches, or words deliberately made by the voter, or where the required cross is made at an improper place on the ballot. (State v. Sadler, 573.)

16. ELECTIONS — BALLOTS — VOTING FOR TWO CANDIDATES FOR SAME OFFICE.—Ballots are not void because the voter has voted for more candidates for the same office than were to be elected, but they will not be counted for such office. (State v. Sadler, 573.)

17. ELECTIONS.—BALLOTS WITH THE CROSSES directly on the line between the names of the candidates for the same office, in such a position as to prevent the court from determining for what candidate they were intended to be cast, while not void, will not be counted for such office. (State v. Sadler, 573.)

18. ELECTIONS — BALLOTS — COLORED PENCIL. — Ballots marked with ink, or with a blue or purple pencil, are void. (State v. Sadler, 573.)

19. ELECTIONS — BALLOTS — UNIFORMITY — RESIGNATION OF CANDIDATE.—Under an election law requiring uniformity in the kind of paper used for ballots, uniformity in the printing, and in the character of markings to be used by the electors, no change can be made in the face of a ballot as printed whereby more than one kind of official ballot is printed and distributed. Hence, where, upon the resignation of a candidate, new ballots are printed omitting his name, and are distributed with the old ballots upon which such candidate's name has been canceled by a red line, the red line ballots, cast in a precinct where there were sufficient new ballots for all who desired to vote, are void. (State v. Sadler, 573.)

See Quo Warranto.

ENTIRETIES.

See Estate by Entirety.

EQUITY.

See Pleading.

ESTATE OF DECEDENT.

See Executors and Administrators.

ESTATE BY ENTIRETY.

ESTATES BY ENTIRETY as they existed at common law do not exist in Nebraska. On the contrary, a husband and wife are now considered as equals, the relation as a dual equality, and the conveyance of land to them does not create an estate in entirety. (Kerner v. McDonald, 550.)

ESTOPPEL.

1. ESTOPPEL.—REPRESENTATIONS AND STATEMENTS made to one who does not act or rely upon them, and who is not misled by them, do not work an estoppel. (Faison v. Grandy, 693.)

2. ESTOPPEL — ELEMENTS.—To constitute an estoppel by conduct in favor of another with respect to the title of the subject matter in dispute, it must appear that the party against whom such estoppel is sought to be established was apprised of the true state

of his own title, that by his conduct he intended to deceive or was guilty of such negligence as amounted to fraud, and that the other party was not only destitute of all knowledge regarding the true state of his title, but of the means of acquiring such knowledge. (*Lower Latham Ditch Co. v. Louden Irr. etc. Co.*, 80.)

3. **ESTOPPEL.—TO SUFFICIENTLY PLEAD** an estoppel based upon statements, it must be averred that the statement relied upon to constitute such estoppel was made with the intention that it should be acted upon. (*Beals v. Cone*, 92.)

4. **ESTOPPEL IN PAIS—PLEADING.**—In order to raise the question of an estoppel in pais the facts constituting such estoppel must be especially pleaded. (*Davidson v. Jennings*, 49.)

5. **ESTOPPEL IN PAIS—WHO MAY INVOKE.**—To entitle a party to invoke the doctrine of estoppel, he must actually have been misled and induced to act to his prejudice by reason of another's conduct, he having on his part exercised due diligence to ascertain the truth. (*Davidson v. Jennings*, 49.)

EVIDENCE.

1. **EVIDENCE—JUDICIAL NOTICE.**—A court will take judicial notice of the records and prior proceedings in a case before it. (*State v. Bates*, 768.)

2. **EVIDENCE—JUDICIAL NOTICE—DECISIONS OF UNITED STATES COURTS.**—If a state law as to a certain class of cases has once been held by the United States supreme court to be in contravention of the constitution of the United States, or *ex post facto*, a state court will, whenever thereafter a case of that class comes before it, take notice of the decision of the national court, and of the question respecting which such decision was made. (*State v. Bates*, 768.)

3. **EVIDENCE AS TO WHETHER WRITING EVER BECAME OPERATIVE.**—**PAROL EVIDENCE** is admissible to show that a writing, in the form of a contract, never became operative as a contract. In other words, a separate agreement, constituting a condition precedent to the attaching of any obligation under the writing, may be shown by parol evidence. (*Reiner v. Crawford*, 848.)

4. **EVIDENCE—CONTRACT PRICE—MARKET VALUE.**—In an action upon a contract to recover for goods sold, where there is a conflict in the evidence as to the price to be paid, evidence of the market value of such goods is admissible, if the jury are instructed that they should consider the evidence only as bearing on the question of probability as to what the contract was as to price. (*Copeland v. Brockton St. Ry. Co.*, 274.)

5. **EVIDENCE OF OWNERSHIP—DOG.**—A collar worn by a dog and having a particular man's name upon it, while not conclusive evidence that such man was the owner of the dog, is admissible in evidence as tending to show that he was such owner. (*Ingraham v. Chapman*, 264.)

6. **EVIDENCE—DECLARATION TO EXPLAIN ACT.**—If it is material to show the purpose or reason for the departure of a person, or of an act done by him, his declarations of his purpose, or reason for so doing, made at or about the time he acts, if made in a natural way, and without any circumstances of suspicion, are admissible as original evidence. (*Mathews v. Great Northern Ry. Co.*, 383.)

7. **EVIDENCE—PHOTOGRAPHS—PRIVATE PARTS OF HUMAN BEINGS.**—IT IS GROSSLY IMPROPER, upon the trial

of an action for personal injuries, brought by a young lady between nineteen and twenty years of age, to admit in evidence photographs showing rear views of the plaintiff's person, nude from below the shoulders to mid-thigh. If the condition of any private part of the body of any party, male or female, is material on any trial, it should be privately examined by experts out of court, and expert testimony be given of it. (*Guhl v. Whitcomb*, 889.)

8. EVIDENCE—RETROACTIVE STATUTES.—A statute declaring that the plats and surveys made by, and in the engineering department of, any municipality in the state are *prima facie* evidence in all proceedings in all courts is valid, and applies to all actions, including those between private parties and those pending at the time of its enactment. (*Fish v. Chicago etc. Ry. Co.*, 398.)

See Appeal; Attorney and Client, 11; Homicide; Insurance, 13; Judgments, 6-8; Marriage and Divorce, 4; Revenue Stamps; Witnesses.

EXCEPTIONS.

See Appeal, 2-7; Instructions, 8.

EXECUTION.

See Corporations, 9.

EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS AND ADMINISTRATORS — GENERAL RIGHT TO PERSONAL PROPERTY—PAYMENT OF DEBTS.—The legal title to personal property of an intestate decedent passes to the administrator, but the equitable title is in the distributees. The administrator has the legal title to the estate for the purpose of paying debts against it, but after they are paid, the residue of the estate goes to the heirs. (*Richardson v. Cole*, 479.)

2. EXECUTORS AND ADMINISTRATORS — HEIRS. DISTRIBUTION BY AMONG THEMSELVES — PARAMOUNT RIGHT.—A public administrator is not entitled to the possession of personal property of an intestate decedent, where there are no debts, and the heirs, being of age, have by consent already made a domestic distribution of the estate among themselves. (*Richardson v. Cole*, 479.)

3. EXECUTORS AND ADMINISTRATORS — ORDER TO TAKE CHARGE OF ESTATE—COLLATERAL ATTACK UPON —WHAT IS NOT.—To deny a public administrator the right to take charge of the personal property of an intestate, where there are no debts, and the heirs have already made a distribution of the estate among themselves, is not a collateral attack upon an order of the probate court directing him to take charge of the estate. (*Richardson v. Cole*, 479.)

4. ESTATE OF DECEDENT—LEGAL REPRESENTATIVES.—A PROMISE TO PAY MONEY at a time in the future sure to arrive inures to the benefit of the legal representatives of the person to whom the money is to be paid, if he is not alive at the time the payment is due. (*Millard v. Brayton*, 294.)

5. DEATH BY WRONGFUL ACT—SETTLEMENT OF CLAIM FOR.—Under a statute giving a right of action for a death caused by a wrongful act, exclusively for the benefit of the widow and next of kin of the deceased, the personal representative of the latter may compromise and settle the claim arising under the statute with the person liable, either before or after the action is brought, and without the consent of the next of kin or the probate court. (*Foot v. Great Northern Ry. Co.*, 395.)

EXEMPTIONS.

See Constitutional Law, 8; Corporations, 9.

EXPRESS COMPANIES.

1. EXPRESS COMPANIES — VISITORIAL POWER OF STATE — INFORMATION AS TO BUSINESS.—Express companies are not corporations subject to the visitorial power of the state, but partnerships engaged in the business of common carriers, and as such may be compelled by the state to furnish information as to all of their property and business within the state, but they cannot be compelled to furnish information as to their interstate business and their property and business outside the state. (*State v. United States Express Co.*, 366.)

2. EXPRESS COMPANIES — CONTROL AND VISITORIAL POWER OF STATE.—An express company is not a corporation, but a partnership, and has the same right to do business in the state without its permission and free from its control and visitorial power as any other individual or partnership, except in so far as its business within the state is affected with a public interest, and therefore subject to public control and regulation. (*State v. United States Express Co.*, 366.)

3. EXPRESS COMPANIES are not subject to the provisions of the interstate commerce acts. (*State v. United States Express Co.*, 366.)

FELLOW-SERVANTS.

See Railroads, 1.

FIDELITY INSURANCE.

See Insurance, 18-25.

FISHERY.

See Waters and Watercourses, 14.

FIXTURES.

FIXTURES — MACHINERY AND ENGINES.—AS BETWEEN A MORTGAGOR AND A MORTGAGEE of real property, machinery and engines attached to a building thereon, by means of lag-screws and bolts, are personal property, which may be removed by the mortgagor, where no intent appears to have had them become a part of the realty, and it does appear that they are not specially designed for the building, but of common lot and description, bought and sold in the markets according to price list and sample; that they are capable of removal without material injury to the premises; and that the building can again be equipped with machinery and engines, suitable for its purposes, without alteration of the structure. (*Neufelder v. Third St. etc. Ry.*, 831.)

FORGED CHECK.

See Banks and Banking, 2, 3.

FORMER JEOPARDY.

CRIMINAL LAW—ASSAULT—COLLUSIVE CONVICTION —BAR TO SUBSEQUENT PROSECUTION.—A defendant who voluntarily goes before a justice of the peace, swears to a complaint charging himself with an assault, and confesses himself guilty, cannot thereafter plead the judgment against himself, rendered in such

a proceeding, as a bar to a subsequent prosecution for the same offense. (*De Bord v. People*, 89.)

See Judgments, 12, 13.

FRAUDULENT CONVEYANCE.

1. **FRAUDULENT CONVEYANCES—PREFERENCES.**—If a debtor in failing circumstances conveys the whole of his goods to a creditor, who pays him the difference between the amount of the debt and the fair value of the goods in cash, with knowledge or notice of such facts as would induce an ordinarily prudent person to make inquiry which would lead to knowledge that such debtor is attempting to defraud his other creditors by such sale, or to hinder and delay them in the collection of their debts, the conveyance is void as to such creditors. (*Henney Buggy Co. v. Ashenfelter*, 503.)

2. **FRAUDULENT CONVEYANCES—WHAT ARE.**—A conveyance may be fraudulent as against creditors, either when it is entered into with actual fraudulent intent, or when, from the nature of the transaction, the conveyance must be held fraudulent as a conclusive presumption of law, without regard to the intent or motives of the debtor. (*Nelson v. Leiter*, 142.)

3. **FRAUDULENT CONVEYANCES WHICH WILL NOT SUPPORT AN ATTACHMENT.**—A statute authorizing a writ of attachment to issue, where the debtor has, within two years prior to the filing of the affidavit required, fraudulently conveyed or assigned his assets in hindrance of creditors, applies only when the conveyance was with actual fraudulent intent to hinder and delay creditors, and not when the conveyance was fraudulent in law, regardless of the intent of the debtor. (*Nelson v. Leiter*, 142.)

4. **FRAUDULENT CONVEYANCES—FRAUD QUESTION OF FACT.**—Whether a prior conveyance of property was made with actual intent to hinder and delay creditors is a question of fact. (*Nelson v. Leiter*, 142.)

5. **FRAUDULENT CONVEYANCES—RIGHT TO PREFER CREDITOR.**—A debtor, in failing circumstances, may pay or secure one creditor to the exclusion of the others, provided the payment is made or security given with intent in good faith to discharge or secure the preferred claim. The fact that the debtor knows that the effect of the transaction, to the extent of such preference, is to hinder and delay other creditors is immaterial. (*Nelson v. Leiter*, 142.)

6. **FRAUDULENT CONVEYANCES—PREFERENCES.**—An act relating to corporations, providing that their liability for money loaned shall not exceed one-tenth of the amount of capital stock actually paid in, is for the protection of depositors and stockholders. The fact that the amount of a preference in favor of a corporation made by a failing debtor exceeds such one-tenth of paid-up capital does not render the indebtedness nor any part of it uncollectible as against other creditors of such debtor. (*Nelson v. Leiter*, 142.)

FUTURES.

See Sales, 1-3.

GAMBLING TRANSACTION.

See Sales.

GARNISHMENT.

See Attachment and Garnishment.

GUARANTY.

1. **GUARANTORS—PAYMENT OF RENT—NOTICE.**—A lessor owes no duty to one who has made an absolute, unconditional guaranty that rent shall be paid, either to take active measures to collect the rent from the lessee, or to notify the guarantor that the lessee is in default. (*Welch v. Walsh*, 302.)

2. **GUARANTORS—NOTICE TO—DEFENSE TO ACTION.**—It is no defense to an action against one who has guaranteed the payment of rent that the defendant has suffered from not knowing that the rent was not paid by the tenant for twenty-three months before the plaintiff made a demand upon him for it. (*Welch v. Walsh*, 302.)

3. **GUARANTY AND SURETYSHIP.—THE DIFFERENCE** between the contract of a guarantor and the contract of a surety is that a guarantor makes a collateral promise to pay, in case default is made by the principal debtor, while a surety contracts directly as a principal to pay the sum of money for which he is secondarily liable. (*Welch v. Walsh*, 302.)

4. **GUARANTY AND SURETYSHIP—NOTICE OF DEBTOR'S DEFAULT.**—No distinction can be made between the contract of a guarantor and the contract of a surety on a bond, so far as concerns the duty of the creditor to give notice of the default of the principal debtor. (*Welch v. Walsh*, 302.)

5. **GUARANTOR OF A NOTE—NOTICE TO.**—The guarantor of a promissory note, even when the only person liable on it is the principal debtor, is entitled to receive notice of the default of the principal debtor, and if he is damnified by not receiving such notice within a reasonable time, he is discharged. (*Welch v. Walsh*, 302.)

HABEAS CORPUS.

1. **HABEAS CORPUS PROCEEDINGS** cannot be used to authorize the exercise of appellate jurisdiction. (*Ex parte Gafford*, 568.)

2. **HABEAS CORPUS.—THE JURISDICTION OF A COURT** or judge to render a particular judgment or sentence by which a person is imprisoned is always a proper subject of inquiry on habeas corpus. (*Ex parte Dela*, 603.)

3. **HABEAS CORPUS—QUESTIONS TO BE DETERMINED.**—While a court on habeas corpus has no power to inquire into mere irregularities of procedure which are properly reviewable on appeal, it will inquire into the jurisdiction of the court rendering the judgment, to ascertain whether it is void for want or excess of jurisdiction, and to ascertain whether the process issued on such judgment under which the petitioner is held is also void. (*Ex parte Dela*, 603.)

See Criminal Law, 13.

HOMICIDE.

HOMICIDE — UNCOMMUNICATED THREATS.—Uncommunicated threats afford no justification for killing. Hence, it is proper to instruct the jury to disregard evidence of threats, if they believe that the deceased was not assaulting, or attempting to assault, the defendant, and that he was not making any hostile, or apparently hostile, demonstration toward the defendant at the time of the homicide. (*State v. Spencer*, 463.)

See Criminal Law, 8-10.

HORSELESS VEHICLES.

See Municipal Corporations, 7.

HUSBAND AND WIFE.

1. HUSBAND AND WIFE — AGENCY OF HUSBAND.—Whether or not a husband is the agent of his wife is a question of fact, and cannot be presumed from the marital relation alone. (Rust-Owen Lumber Co. v. Holt, 512.)

2. EVIDENCE — PRESUMPTION.—**COVERTURE** once shown is presumed to continue. (Wallace v. Pereles, 898.)

3. HUSBAND AND WIFE — CONVEYANCE BETWEEN—LEGAL TITLE.—Prior to the enactment of the Wisconsin statute, Laws of 1895, chapter 86, an absolute conveyance of real property from a husband directly to his wife did not carry the legal title, unless the property was purchased by the wife out of her separate estate. (Wallace v. Pereles, 898.)

4. HUSBAND AND WIFE—CONVEYANCE BETWEEN—BURDEN OF PROOF.—In a contest over land conveyed by a husband to his wife, she, or one taking from her with notice, must show by clear and satisfactory evidence that her purchase from her husband was made in good faith, and for a valuable consideration paid out of her separate estate, or by a third person for her. A mere recital of a valuable consideration in the conveyance will not support a recovery in her favor. (Wallace v. Pereles, 898.)

5. HUSBAND AND WIFE—SEPARATION AGREEMENT.—An oral contract between a husband and wife, without the intervention of a trustee, to separate and live apart, is absolutely void, as against the legislative policy of the state. (Baum v. Baum, 854.)

6. HUSBAND AND WIFE—SEPARATION AGREEMENT—CONSIDERATION.—An agreement by a husband to assign insurance policies to his wife for no other consideration than a covenant on her part to live separate and apart from him is without a valid consideration and will not be enforced, though it has been partially executed. (Baum v. Baum, 854.)

7. HUSBAND AND WIFE—SEPARATION AGREEMENT—ACTION AS TO SEPARATE ESTATE.—If a husband agrees to assign insurance policies to his wife in consideration of her separating and living apart from him, an action by her to enforce the assignment is not an action regarding her separate estate, where she has no property. (Baum v. Baum, 854.)

See Contracts, 8, 9; Insurance, 9, 10; Limitation of Actions, 4; Mechanics' Liens, 3-5; Witnesses.

ICE.

See Waters and Watercourses, 7-10.

INDICTMENT.

See Criminal Law, 1-4.

INEBRIATES.

See Constitutional Law, 27.

INJUNCTION.

1. INJUNCTION AGAINST CONTINUING TRESPASS.—If a defendant has been guilty of trespass upon the plaintiff's land

which he intends to continue, no question of title or right of way being involved, a court having general equity powers may issue an injunction against the continuing of such trespasses. (Boston etc. R. R. v. Sullivan, 275.)

2. **INJUNCTIONS—PROTECTION OF EASEMENT.**—If a person is granted an easement in a flight of stairs by deed, to remain at the place where they are then located, and he refuses permission to change their location and begins suit to enjoin such change, he is entitled to an injunction to compel the restoration of the stairway, if, after the dismissal of his suit and pending an appeal therein, the defendant makes the change, although the cost of restoring the building to its former condition is greater than the injury to the complainant. (Ives v. Edison, 329.)

3. **INJUNCTION — REFUSAL BECAUSE OF EXTREME HARDSHIP.**—If a municipal corporation has, at great expense, constructed and put in operation, and for a long series of years has used and enjoyed, a system of sewerage, accommodating a population of one hundred thousand people, an injunction against the continued use of such system must be refused, on the ground that it would be inequitable to give such relief, if relief can otherwise be afforded, as by making just compensation in money. (Gray v. Mayor etc., 642.)

4. **THE GRANT OR REFUSAL OF AN INJUNCTION IS A MATTER RESTING IN THE SOUND DISCRETION** of the court. (Gray v. Mayor etc., 642.)

INNKEEPERS.

INNKEEPERS.—LODGING-HOUSE KEEPERS are not, in a legal sense, innkeepers, hotel-keepers, or boarding-house keepers. (Bailey v. People, 116.)

See Constitutional Law, 18-20.

INSTRUCTIONS.

1. **TRIAL—INSTRUCTIONS.**—If erroneous instructions, clearly applying to the facts in the case, are given to the jury, such error is not cured by subsequent correct instructions not directly pointing out and correcting the erroneous instructions. (Gorstz v. Pinske, 441.)

2. **TRIAL — ABSTRACT INSTRUCTIONS.**—Instructions given by the court to the jury must apply the law to the essential facts in a practical and concrete form. Error in this respect is not cured by a general, correct abstract instruction upon the same subject. (Gorstz v. Pinske, 441.)

3. **TRIAL—CONCRETE AND ABSTRACT INSTRUCTIONS—PRESUMPTION.**—Correct statements of abstract propositions by a court contained in instructions must be considered in view of the whole charge, and, if coupled or connected with misleading or injurious instructions of a concrete nature, it must be presumed on appeal that the jury gave more weight to those portions of the charge directly affecting the question involved, as stated in such concrete form, than to the abstract modifications in other portions of the charge, although literally correct. (Gorstz v. Pinske, 441.)

4. **INSTRUCTIONS — APPEAL — NECESSITY OF EXCEPTION.**—An objection that the trial court erred in giving an instruction cannot be considered on appeal where no exception thereto was taken. (Reiner v. Crawford, 848.)

5. **APPEAL—INSTRUCTIONS GIVEN AT APPELLANT'S REQUEST.**—Error in giving an erroneous instruction cannot be urged on appeal by one at whose request it was given. (*Reiner v. Crawford*, 848.)

6. **INSTRUCTIONS—WHEN ERRONEOUS—SPECIAL VERDICT—GENERAL VERDICT.**—When a case is submitted to a jury for a special verdict, it is error to give instructions applicable only to a general verdict. (*Bartlett v. Collins*, 928.)

7. **INSTRUCTIONS—LEGAL EFFECT OF ANSWER—SPECIAL VERDICT.**—It is error to state to a jury the legal effect of their answer to a question in the special verdict. (*Sheppard v. Rosenkrans*, 886.)

8. **INSTRUCTIONS — EXCEPTION TO — WHEN INSUFFICIENT.**—An omnibus exception which includes two or more distinct propositions, some of which are correct, is insufficient to present the question as to the correctness of any one of the propositions singly. (*Sheppard v. Rosenkrans*, 886.)

INSURANCE.

1. **INSURANCE.—RECITALS IN POLICIES OF INSURANCE** which are not contractual elements thereof are not conclusive on the parties thereto. (*Commonwealth Mut. Fire Ins. Co. v. Hayden*, 545.)

2. **INSURANCE — FOREIGN CORPORATION — CONTRACTS OF—FAILURE TO COMPLY WITH LAWS.**—A foreign insurance company doing business in a state without complying with, and in defiance of, its laws, cannot insist that its courts must, as an exercise of comity, give effect to its contracts made with citizens of the state. (*Commonwealth Mut. Fire Ins. Co. v. Hayden*, 545.)

3. **INSURANCE.—MEMBERSHIP** in a mutual insurance company ceases with the expiration of the member's policy, and payment of the liabilities incurred while the policy was in force. Jurisdiction of such company does not include jurisdiction over ex-members who are not in fact indebted on account of policies once held by them. (*Commonwealth Mut. Fire Ins. Co. v. Hayden*, 545.)

4. **INSURANCE — FIRE — CONDITIONS — STORING EXPLOSIVES.**—If a fire insurance policy provides that it shall become void if gasoline is kept, used, or allowed on the insured premises, the policy is avoided by temporarily storing a small quantity of gasoline to be used in a gasoline stove for cooking purposes. (*Boyer v. Grand Rapids Fire Ins. Co.*, 338.)

5. **INSURANCE — FIRE—CONDITIONS CONCERNING EXPLOSIVES — DESCRIPTION OF PREMISES.**—A fire insurance policy on a three-story building described therein covers a one-story addition to such building adjoining to, connected therewith, and for a long time previously thereto used and occupied in connection therewith, so as to avoid the policy for the unauthorized storing of explosives in such addition. (*Boyer v. Grand Rapids Fire Ins. Co.*, 338.)

6. **INSURANCE — FIRE — FORFEITURES.**—Statutes designed to prevent forfeitures of fire insurance policies by the violation of any condition of the policy, when such violation has been without prejudice to the insurer, do not apply to a loss occurring during a breach of the contract and while its terms were being violated to the prejudice of the insurer. (*Boyer v. Grand Rapids Fire Ins. Co.*, 338.)

7. INSURANCE—FIRE—PROOF OF LOSS—FORFEITURE FOR FAILURE OF.—If an insurance policy provides that proof of loss shall be furnished within a specified time after loss, but does not provide that failure to do so shall work a forfeiture of the policy, nor make the furnishing of such proof of loss a condition precedent to the liability of the insurer, the time within which such proof is required to be furnished is not of the essence of the contract, and the failure to furnish such proof within such time does not invalidate nor work a forfeiture of the policy, but only postpones the time of payment. (*Mason v. St. Paul etc. Ins. Co.*, 433.)

8. LIFE INSURANCE—PLACE OF CONTRACT.—Where an application for a life insurance policy in favor of a named beneficiary is made in one state to the duly authorized agent of the company located there, who forwards it to the home office in another state, where it is accepted, but the policy returned contains additional beneficiaries, and was not to be delivered until the first premium was paid, the contract of insurance was not made until the policy as changed was delivered to the applicant and the premiums paid, and it is deemed a contract made in the former state, and the rights of the parties are to be determined by the law of such state. (*Millard v. Brayton*, 294.)

9. LIFE INSURANCE—CONTRACT WITH WIFE ON HUSBAND'S LIFE.—Where a wife, having an insurable interest in the life of her husband, makes application to insure such interest, and upon such application a policy is issued insuring that interest, and not the husband's interest, in his own life, and the promise to pay, although not made in express terms to the wife, was in law a promise to her, the contract of insurance is in law between her and the company, notwithstanding her husband caused the application to be made and paid all the premiums. (*Millard v. Brayton*, 294.)

10. LIFE INSURANCE—CONTRACT WITH WIFE—INTEREST OF CHILDREN.—Where a wife insures her interest in the life of her husband for her own benefit if she survives him, otherwise for the benefit of her children, the children, upon her death during the life of her husband, take a vested interest in such insurance policy, which survives to their legal representatives as against the representatives of the husband. (*Millard v. Brayton*, 294.)

11. LIFE INSURANCE—WHEN COMPLETE—REPRESENTATION OF AGENT.—If the application for life insurance stipulates that the insured incurs no liability until the policy is issued and delivered, there can be no recovery in the absence of such issuing and delivery, though the first premium is paid, and the agent who solicited the insurance assured the applicant that it would go into effect at once. (*Chamberlain v. Prudential Ins. Co.*, 851.)

12. LIFE INSURANCE—WRITTEN CONTRACT OF. CANNOT BE VARIED BY PAROL.—A written contract of life insurance, which is not to go into effect until the application has been accepted, and a policy issued and delivered, cannot be varied by parol evidence that the insurance agent told the applicant that the insurance would go into effect at once. (*Chamberlain v. Prudential Ins. Co.*, 851.)

13. LIFE INSURANCE—ACTION—EVIDENCE OF TRANSACTION WITH DECEASED PERSON—ADMISSIBILITY.—Under a statute which excludes the testimony of a party as to transactions personally had with a deceased person, when the opposite party "sustains his liability" from, through, or under such deceased person, the wife of a deceased person may, in an action by her

upon an alleged contract of life insurance made with him, testify as to a conversation between him and the agent of the insurance company, because the company does not sustain its liability, "from, through, or under" the insured. (*Chamberlain v. Prudential Ins. Co.*, 851.)

14. LIFE INSURANCE—AGENTS—ACTS OF, WHEN BINDING—PRESUMPTION AS TO CONTINUANCE OF AGENCY.—When a life insurance company has held a person out as its agent, the company is bound by his acts, and the agency will be presumed to continue until the contrary is proved. (*Hall v. Union Cent. Life Ins. Co.*, 844.)

15. LIFE INSURANCE—ACTION—ADMISSIONS OF AGENT—ADMISSIBILITY AND BINDING EFFECT OF.—When it is the duty of an agent of a life insurance company to collect and pay premiums to it, his admissions concerning such payments, made by a decedent in his lifetime, are admissible in evidence, in an action on the policy, and binding on the company, though such admissions were not made at the time of the execution of the contract of insurance. (*Hall v. Union Cent. Life Ins. Co.*, 844.)

16. LIFE INSURANCE—SECRET CONTRACT BETWEEN AGENT AND SUBAGENT—LIABILITY OF COMPANY.—Neither corporations nor individuals can escape their honest liabilities by secret understandings between principals and agents. Hence, if a person is employed as agent of a life insurance company, but, by a secret contract between him and the company's general agent, he is to be simply a subagent, and he is held out as agent of the company, with power to collect and pay over premiums to its general agent, the company must answer for collections made by him but not turned over to it. (*Hall v. Union Cent. Life Ins. Co.*, 844.)

17. LIFE INSURANCE—ACTION ON POLICY—WHEN NOT BARRED BY DELAY.—Though a policy of life insurance requires that an action thereon shall be commenced within a year from the death of the insured, it cannot be held that an action commenced after the expiration of nineteen months from such death is barred, where the company promised to pay if the premiums had been paid, and prevailed upon the plaintiff to wait until after the year had expired for the return of their agent from the Klondike country, to whom it was claimed the premiums had been paid. Nor will a court say that such delay was unreasonable, as a matter of law, where the question of reasonableness was submitted to the jury and found in favor of the plaintiff. (*Hall v. Union Cent. Life Ins. Co.*, 844.)

18. FIDELITY INSURANCE—PLEADING CONTRACT—DEFECT IN COMPLAINT CURED BY ANSWER.—In a suit upon a penal bond, the fault of the plaintiff in not setting out in full the contract of suretyship is cured by the pleading of the defendant in making it a part of his answer. (*Bank of Tarboro v. Fidelity etc. Co.*, 682.)

19. FIDELITY INSURANCE—BREACH OF BOND—PLEADING AND PROOF.—In a suit upon a penal bond, the defendant, if he relies upon breaches of the contract upon the part of the plaintiff to defeat a recovery, must plead and prove them. (*Bank of Tarboro v. Fidelity etc. Co.*, 682.)

20. FIDELITY INSURANCE—APPLICATION—BOND.—SURETY COMPANIES, whose bonds are modeled after some form of insurance policy, and are based upon applications containing a

large number of questions and answers, are in the nature of insurance companies. (*Bank of Tarboro v. Fidelity etc. Co.*, 682.)

21. **EVIDENCE—MEMORANDUM OF EXAMINATION.**—In a suit by a bank upon the bond of its cashier, a memorandum of the examination of the cashier before a committee of the board of directors of the bank, prior to the suit, made at the time of the examination, and read over to the cashier, who said it was correct, is admissible in evidence. (*Bank of Tarboro v. Fidelity etc. Co.*, 682.)

22. **SURETIES—RELEASE FROM LIABILITY.**—Under a statute allowing a surety company to be released from its liability on a bond on the same terms as an individual, such a company can release itself from liability only by getting off the bond. (*Bank of Tarboro v. Fidelity etc. Co.*, 682.)

23. **FIDELITY INSURANCE — CONSTRUCTION — SURETY COMPANIES.**—A BOND given by a surety company, which in its form and essence resembles an insurance contract, is to be construed as such a contract, most strongly against the company, and most favorably to its general intent and essential purpose. (*Bank of Tarboro v. Fidelity etc. Co.*, 682.)

24. **FIDELITY INSURANCE—BREACH OF BOND—NOTICE TO SURETY COMPANY.**—A bank is not required to give notice to a surety company, which has given a bond as surety for the bank's cashier, upon mere suspicion that the cashier was guilty of fraudulent conduct, but is entitled to a reasonable time to investigate in order to ascertain the facts which would justify the charge of fraud or embezzlement. (*Bank of Tarboro v. Fidelity etc. Co.*, 682.)

25. **FIDELITY INSURANCE—BOND—DUTY OF BANK—INSTRUCTION.**—In a suit by a bank upon a surety bond, an instruction that the officers of the bank are required to give the same supervision and care over the management of the affairs of the bank as an ordinarily prudent business man would give is correct. (*Bank of Tarboro v. Fidelity etc. Co.*, 682.)

INTEREST.

1. **INTEREST—CONFLICT OF LAWS.**—Where money is loaned in one state upon real estate situated in another, the security being the basis of the loan, the rate of interest is governed by the laws of the latter state. (*Faison v. Grandy*, 693.)

2. **INTEREST, RATE OF, WHEN NOT CHANGED BY INDORSEMENT.**—If, upon a bond secured by a mortgage, the president of the corporation holding the premises makes an indorsement that, in consideration of the extension of the time of payment, the rate of interest shall, after such indorsement, be changed from six per cent to seven, but the indorsement is not made in a manner binding the corporation, it must be disregarded, though the bond and mortgage were permitted to stand without any attempt to enforce them for many years after the making of such indorsement. (*Colton v. Depew*, 650.)

See Usury.

INTERNAL REVENUE.

See Revenue Stamps.

JOINT TRESPASSERS.

1. **TRESPASS — JOINT. — AN UNSATISFIED JUDGMENT AGAINST ONE TRESPASSER** is no bar to a suit against another for the same trespass. (*Martin v. Buffaloe*, 679.)

2. **RES JUDICATA—ACTION AGAINST COTRESPASSER.**—A point decided in an action against one trespasser is not *res judicata* in an action against a cotrespasser. (*Martin v. Buffaloe*, 679.)

JUDGMENTS.

1. **JUDGMENT AS EVIDENCE OF PARAMOUNT TITLE.**—A judgment which establishes a paramount right to land as against one in possession is not *prima facie* evidence of the existence of a paramount title, or of eviction thereby, as against a defendant who had no notice of the action until after judgment was rendered. (*Wallace v. Pereles*, 898.)

2. **JUDGMENTS—RES JUDICATA—SUBSEQUENT APPEAL.** A decision on questions presented to the supreme court in reviewing proceedings of the district court becomes the law of the case, and cannot be re-examined upon a subsequent appeal therein. (*Barker v. Wheeler*, 541.)

3. **RES JUDICATA—PARTIES—NOTICE OF ACTION.**—A prior judgment is not *res judicata* as respects the rights of a plaintiff in a subsequent action, where he was not a party to the action in which the prior judgment was rendered, although he had notice of the pendency of the action, since identity of parties is an essential element necessary to render a judgment in one case *res judicata* in another. (*Lower Latham Ditch Co. v. Loudon Irr. etc. Co.*, 80.)

4. **RES JUDICATA—PARTIES—MINING CLAIM.**—To constitute a judgment in one action *res judicata* in another the quality of the parties to each must be the same. Hence a judgment by the land department that certain parties are not entitled to be vested with the fee in a mining claim, rendered upon the hearing of a protest by others who make no claim to the subject matter of the controversy, is not *res judicata* in subsequent adverse action by such protestants as owners of a conflicting claim, since the capacity in which the protestants acted in the protest proceedings is entirely different from their capacity in the subsequent action. (*Beals v. Cone*, 92.)

5. **JUDGMENTS OF SISTER STATES—PLEADING AND EVIDENCE IN ACTIONS ON—JURISDICTION.**—In an action in one state on a judgment of a court of a sister state, the defendant may plead and prove that such court had no jurisdiction to render such judgment but the burden is upon him to show such want of jurisdiction. (*Commonwealth Mut. Fire Ins. Co. v. Hayden*, 545.)

6. **JUDGMENT OF SISTER STATE—ACTION ON—JUDICIAL NOTICE OF LOCAL LAWS.**—When a judgment for alimony, rendered in a sister state, is sued upon here, the courts of this state take judicial notice of the local laws of the state from which the record of the judgment comes. (*Trowbridge v. Spinning*, 806.)

7. **JUDGMENT OF SISTER STATE—PLEADING.**—It is not necessary, in an action upon the judgment of a sister state, rendered, as alleged in the complaint, by a court of general jurisdiction, to allege jurisdictional facts. (*Trowbridge v. Spinning*, 806.)

8. **JUDGMENT OF SISTER STATE—JUDICIAL NOTICE OF JURISDICTION.**—In an action upon a judgment for alimony rendered, as shown by the complaint, "in the circuit court of the city of St. Louis," in the state of Missouri, a court of this state will

take judicial notice that the Missouri court had jurisdiction to render the judgment alleged. (*Trowbridge v. Spinning*, 806.)

9. JUDGMENT OF SISTER STATE FOR ALIMONY—WHEN FINAL.—A judgment for alimony, rendered in a sister state, is final, and will be so regarded in this state, where it allows a gross sum to the wife, although the court which rendered it has power, under the statute, on the application of either party, to make such alteration from time to time, respecting the allowance of alimony, as may be proper. (*Trowbridge v. Spinning*, 806.)

10. JUDGMENTS, VOID—LAW OF CASE.—If a decision by a national court renders absolutely void convictions and judgments in certain cases which have never been appealed from, a person released from sentence under such void judgment may be rearrested and prosecuted for the same offense. (*State v. Bates*, 768.)

11. JUDGMENTS.—A VOID JUDGMENT IS REALLY NO JUDGMENT, and leaves the parties litigant in the same position they were in before the trial. (*State v. Bates*, 768.)

12. JUDGMENTS, VOID—CRIMINAL CASES.—A judgment in a criminal case tried before an unlawful jury and all proceedings therein after entry of plea are wholly void for want of jurisdiction, and may be so treated everywhere and at all times. (*State v. Bates*, 768.)

13. JUDGMENTS — VOID — CRIMINAL CASES — JEOPARDY.—If a judgment of conviction is void, the accused has not been put in jeopardy, and upon his discharge under such void judgment he may be rearrested and held for trial under the same indictment. (*State v. Bates*, 768.)

14. JUDGMENTS, VACATING—EFFECT OF.—If a person, by judgment in claim and delivery proceedings commenced without his knowledge or consent, obtains possession of personal property which he retains he cannot, by motion, without a return or offer to return the property, have the judgment and proceedings set aside, on the ground that they were taken without his knowledge or authority, and the judgment upon such motion is conclusive of the right of the defendant in the claim and delivery proceedings to the return of the property. (*Deering Harvester Co. v. Donovan*, 417.)

See Corporations, 8; Joint Trespass; Mortgages, 3, 4; Records.

JUDICIAL NOTICE.

See Evidence, 1, 2; Judgments, 6-8.

JUDICIAL SALES.

JUDICIAL SALES—RATIFICATION.—If a judicial sale is made in pursuance of a decree of court, it is the duty of that court to ratify the sale, regardless of irregularities in the process issued by the clerk. (*Passumpsic Sav. Bank v. Maulick*, 539.)

JURISDICTION.

See Venue.

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—LEASE, WITH PRIVILEGE OF EXTENSION—CONSTRUCTION OF.—A lease for a term stated, with the privilege of an extension by giving notice before the original term expires, is an unconditional lease for the origi-

nal term and a conditional lease for the term thereafter. (*Sheppard v. Rosenkrans*, 886.)

2. **LANDLORD AND TENANT—LEASE WITH PRIVILEGE OF EXTENSION—HOW LESSEE HOLDS.**—If a lessee, under his lease, has the privilege of an extension, and holds over upon giving notice as therein required, he holds for the additional term under the original lease and not under the notice. (*Sheppard v. Rosenkrans*, 886.)

3. **LANDLORD AND TENANT—LEASE—NOTICE FOR AN ADDITIONAL TERM—STATUTE OF FRAUDS.**—The act of a lessee in giving notice that he will hold for an additional term, according to the privilege of his lease, is not the making of an agreement concerning land. It is not, therefore, within the statute of frauds, concerning that subject, and may be given by an agent having no written authority. (*Sheppard v. Rosenkrans*, 886.)

4. **COTENANCY—LANDLORD AND TENANT.**—If one cotenant leases his share of the common property to another, the parties to the lease bear to each other the relation of landlord and tenant, subject to its obligations and rights. (*Schmidt v. Constans*, 437.)

5. **COTENANCY—LANDLORD AND TENANT—COST OF REPAIRS.**—If the relation of landlord and tenant exists between cotenants, the one in possession of the whole premises cannot, in an action for partition, charge his landlord for repairs made upon the property, in the absence of a special agreement that he shall be compensated therefor. (*Schmidt v. Constans*, 437.)

See Guaranty.

LARCENY.

1. **LARCENY FROM DIFFERENT PERSONS IS ONE OFFENSE, WHEN.**—If the stealing of different articles of property is at the same time and place, so that the transaction is the same, it is but one offense, although the property stolen may have belonged to different persons. (*State v. Maggard*, 484.)

2. **LARCENY FROM DIFFERENT PERSONS—DISTINCT OFFENSES.**—If property stolen belongs to different persons, and is located at different places, as where some of it is in wagons in a wagon-yard, and other portions of it in a shed or stable loft near by, each asportation with intent to steal constitutes a different offense, although the thefts may all have been committed in rapid succession and in pursuance of a formed design to steal. (*State v. Maggard*, 484.)

3. **PETIT LARCENY—WHAT IS.**—If property stolen from any one place, where there have been distinct larcenies from different persons, does not amount in value to as much as thirty dollars, the theft is petit larceny. (*State v. Maggard*, 484.)

4. **LARCENY—STANDARD OF VALUE—PROPER INSTRUCTION.**—While the market value of goods stolen is, as a general rule, the standard of value, yet if there is no evidence that any of the articles described in an indictment for larceny had a marketable value, but all of the evidence is directed to their actual value, there is no error in telling the jury to be governed by what the evidence shows the property to have been actually worth. (*State v. Maggard*, 484.)

See Pledges.

LAW.

LAW—RULES OF—SUBSTANTIAL JUSTICE.—Rules of law must be adjusted to the end that actions will be capable of

a practical determination, with a reasonable certainty of substantial justice. (*Strauss v. Mutual Reserve etc. Assn.*, 699.)

LEASE.

See Landlord and Tenant.

LICENSE.

See Constitutional Law, 13; Timber.

LIENS.

LIENS—TRANSFER OF DEBT.—The assignment of a debt carries with it all liens or other security for its payment. (*Woodland Co. v. Mendenhall*, 445.)

See Mechanics' Liens; Receivers.

LIMITATION OF ACTIONS.

1. **STATUTE OF LIMITATIONS—WHEN DOES NOT RUN.**—When payment is provided for out of a particular fund, or in a particular way, the debtor cannot plead the statute of limitations without showing that the particular fund has been provided, or the method pursued. (*Davis v. Simpson*, 570.)

2. **THE STATUTE OF LIMITATIONS DOES NOT APPLY TO COURTS OF EQUITY**, but proceedings in equity to enforce a legal right are within the spirit and meaning of the statute, and have always been so considered. If the matter in controversy in such a court is of a purely equitable nature, not cognizant in a court of law, the statute of limitations has no effect, but the court may apply the doctrine of neglect and lapse of time according to discretion, regulated by precedents and peculiar circumstances, but when the two courts have concurrent jurisdiction, and also when the aid of equity is invoked on account of special circumstances, such as the need of discovery, the difficulty of proceeding at law or the like, the statute is as effectual a bar as at law, with the qualification that, in case of fraud, it commences running with the discovery of the fraud. (*Colton v. Depew*, 650.)

3. **THE STATUTE OF LIMITATIONS DOES NOT EXTINGUISH A DEBT**, but merely takes away a remedy for its enforcement. (*Colton v. Depew*, 650.)

4. **LIMITATION OF ACTIONS—ABSENCE FROM STATE—HUSBAND AND WIFE.**—A statute providing that the time of the absence of a party from the state after the accrual of a cause of action against him shall not be taken as any part of the time limited for the commencement of the action applies when both the maker and payee of a note, husband and wife, remove to and reside for a time in another state. (*Blackburn v. Blackburn*, 325.)

See Adverse Possession; Mechanics' Liens, 7; Mortgages, 8, 9; Taxation, 3.

LODGING-HOUSE.

See Constitutional Law, 18-20; Innkeepers.

LOTTERY.

1. **LOTTERY.—CONTRACTS OF INVESTMENT DEBENTURES OR CERTIFICATES** which by any device may be called in and redeemed at any period before they would regularly accumulate a credit in the reserve fund equal to the contracted en-

dowment value, and otherwise giving unequal advantages to certificate holders, are unlawful as being lotteries. (*State v. Interstate Sav. etc. Co.*, 754.)

2. **LOTTERY.—CONTRACTS OF INVESTMENT DEBENTURES OR CERTIFICATES** which cannot be expected to accumulate a reserve fund equal to the contracted endowment values within the period stated without aid from lapses or appropriations of premiums on new business constitute a lottery, and are unlawful as against public policy. (*State v. Interstate Sav. etc. Co.*, 754.)

MANDAMUS.

MANDAMUS DOES NOT LIE to enforce the fulfillment of a mere contractual obligation. (*New Orleans Auxiliary Sanitary Assn. in Liquidation*, 230.)

See Taxation, 3.

MARKETS.

See Constitutional Law, 38-42.

MARKET VALUE.

See Evidence, 4.

MARRIAGE AND DIVORCE.

1. **DIVORCE—CRUELTY—ABANDONMENT.**—Where a husband is compelled to leave, and live separate from his wife on account of her cruelty and misconduct, he is entitled to an absolute divorce. (*Setzer v. Setzer*, 666.)

2. **DIVORCE—RECRIMINATION—ADULTERY AFTER ABANDONMENT.**—When a husband is compelled to leave, and live separate from, his wife on account of her cruelty, it is no defense to an action by him for divorce that he committed adultery after the separation. (*Setzer v. Setzer*, 666.)

3. **DIVORCE—ADULTERY.**—Under the statute of North Carolina, the adultery of a husband is not a cause for divorce, unless he separates from his wife and lives in adultery. (*Setzer v. Setzer*, 666.)

4. **DIVORCE—EVIDENCE—CONVERSATION BETWEEN HUSBAND AND WIFE.**—In an action for divorce, a husband will not be permitted to testify as to a private conversation with his wife, in which she refuses to return to his home, where no one else was present, and there was no abuse, threat, or assault, under a statute prohibiting a husband or wife from testifying as to private conversations with each other. (*Fuller v. Fuller*, 273.)

5. **DIVORCE—DECREE OF AGAINST NONRESIDENT—WHEN CONCLUSIVE.**—A decree of divorce, where the jurisdiction rests solely on the domicile of the complainant, and the defendant, being a nonresident, is brought into court by publication, and the service of notice outside of the jurisdiction, is conclusive against such nonresident in the courts of other states, including that of which she was a resident when the suit against her was instituted, and the publication made and notice served. (*Felt v. Felt*, 612.)

See Judgments, 9.

MARRIED WOMEN.

See Husband and Wife.

MASTER AND SERVANT.

1. MASTER AND SERVANT—ASSUMPTION OF RISK.—An employé assumes the risk of an obvious danger connected with his employment, where he understands the danger perfectly, and it does not depend upon the negligent act of another employé, and after making complaint and being told that he would have to continue to work under the same conditions or leave, he retains his position. (*Lamson v. American Axe etc. Co.*, 267.)

2. MASTER AND SERVANT—ASSUMPTION OF RISK—FEAR OF LOSING POSITION.—A servant assumes the risk of an obvious danger connected with his employment, although the fear of losing his position is one of the motives which induces him to continue his work. (*Lamson v. American Axe etc. Co.*, 267.)

3. MASTER AND SERVANT—IMPERFECT TOOLS.—A master is not liable for an injury to his servant due to imperfections in small and common tools in every-day use, such as a hammer. (*Martin v. Highland Park Mfg. Co.*, 671.)

4. MASTER AND SERVANT—INJURY FROM DOING WORK OUTSIDE OF EMPLOYMENT.—A master is not liable to his servant for an injury caused by doing work outside of the scope of his employment at the request of another servant made without authority. (*Martin v. Highland Park Mfg. Co.*, 671.)

5. MASTER AND SERVANT—DANGEROUS WORK OUTSIDE OF EMPLOYMENT.—A master is not liable for an injury to his servant caused by his being ordered to do dangerous work outside of the scope of his employment, unless such work was more dangerous and complicated than that in which he was engaged. (*Martin v. Highland Park Mfg. Co.*, 671.)

6. MASTER AND SERVANT—LIABILITY FOR UNAUTHORIZED ACT OF SERVANT.—If the driver of a delivery wagon, who, under agreement with his employer, when delivering goods to cash customers must collect the price of the goods delivered, or account for any resulting loss, delivers goods without collecting the price and afterward, in attempting to collect it or retake the goods, commits an assault and battery or other violence, he, and not the employer, is liable therefor. (*McDermott v. American Brewing Co.*, 225.)

7. MASTER AND SERVANT—LIABILITY FOR MALICIOUS ACT OF SERVANT.—If a servant goes outside of his employment without regard to his service, acting with malice, and wantonly causes damages to another, his master is not liable. (*McDermott v. American Brewing Co.*, 225.)

8. MASTER AND SERVANT—LIABILITY FOR ACTS OF SERVANT.—A servant has implied authority to do what is necessary to protect his master's property, or fulfill the duties intrusted to him; but if he steps aside from the scope of his employment, actuated by personal malice, or by motives of his own, he is, and the master is not liable for the wrong committed. (*McDermott v. American Brewing Co.*, 225.)

9. TORT—PLEADING—MALICIOUSLY INDUCING EMPLOYER TO DISCHARGE EMPLOYE.—In an action for maliciously inducing another to discharge his employé, the complaint should set out the substance of the false statements by which the defendant is alleged to have induced such discharge. (*Moran v. Dunphy*, 289.)

10. TORT.—TO INDUCE A THIRD PERSON, MALICIOUSLY AND WITHOUT JUSTIFIABLE CAUSE, to end his employment

of another, whether the inducement be by false slanders or successful persuasion, is an actionable tort. (*Moran v. Dunphy*, 289.)

MECHANICS' LIENS.

1. **MECHANICS' LIEN LAW—CONSTITUTIONALITY OF.**—A mechanic's lien law which gives to contractors, subcontractors, materialmen, and laborers a lien on buildings for which they have furnished material or performed labor, is not unconstitutional as depriving the land owner of property without due process of law, or as impairing the obligation of contracts, or as granting to one class of citizens privileges not granted upon the same terms to others. (*Barrett v. Millikan*, 220.)

2. **MECHANICS' LIENS—CONTRACTUAL RELATIONS.**—A mechanic's lien in favor of a principal contractor grows out of the contractual relations between the owner of the property improved, or his authorized agents, and such principal contractor, and the right thereto is based upon contract, and for the purpose of securing debts due thereunder. (*Rust-Owen Lumber Co. v. Holt*, 512.)

3. **MECHANICS' LIENS ON PROPERTY OF MARRIED WOMEN.**—Under statutes giving liens for work or material furnished by virtue of a contract with the owner of the land, a mechanic's lien cannot be created upon the land of a married woman under a contract with her husband alone, acting merely for himself. (*Rust-Owen Lumber Co. v. Holt*, 512.)

4. **MECHANICS' LIENS ON PROPERTY OF MARRIED WOMEN—KNOWLEDGE OF WIFE.**—The mere fact that a wife has knowledge of the construction of a building by her husband on her property does not of itself necessarily establish the agency of her husband to charge such property with a lien for material used thereon, nor does her mere failure to dissent from the proposed transaction import an intention to bind her real estate to the payment of the debt. (*Rust-Owen Lumber Co. v. Holt*, 512.)

5. **MECHANICS' LIENS ON PROPERTY OF MARRIED WOMEN—FAMILY RESIDENCE—RATIFICATION OF HUSBAND'S ACTS.**—No conclusive presumption of ratification of the husband's acts arises from the occupation by his wife with him of a building as a family residence, constructed by him on her land, so as to make effective a mechanic's lien, where none theretofore legally attached. At most, it is only a circumstance to be considered with other facts and circumstances for the purpose of determining the question of the alleged ratification. (*Rust-Owen Lumber Co. v. Holt*, 512.)

6. **MECHANICS' LIENS—PROCEEDINGS TO ENFORCE WHEN COMMENCED.**—Under a statute providing that mechanics' liens shall continue for one year after the statement of lien is filed, and no longer, unless proceedings are begun to enforce the lien, and that such proceedings shall be by bill in chancery and notice of lis pendens, and that all persons having rights or like liens in the property, or having filed notice of intention to claim a lien, shall be made parties, the proceedings are begun when the bill is filed and the fact that the principal contractor is not made a party until after the year has expired cannot affect the rights of the complainant lienholder. (*Casserly v. Wayne Circuit Judge*, 320.)

7. **PLEADINGS—AMENDMENT BRINGING IN NEW PARTY—LIMITATIONS.**—If, in proceedings to enforce a mechanic's lien, a necessary party is made a party by amendment of the bill after the statutory time for bringing suit has expired, he is the only person who can take advantage of the fact that he was not made a

party to the bill within the time limited. (*Casserly v. Wayne Circuit Judge*, 320.)

8. **CONSTITUTIONAL LAW—LIENS—ATTORNEYS' FEES.**—A statute giving a lien to persons who furnish merchandise or material for the development of a mine is unconstitutional, in so far as it provides that in a suit to foreclose such lien the successful lien claimant shall be allowed a reasonable attorney's fee as costs, as contravening a constitutional provision "that courts of justice shall be open to every person, . . . and that right and justice shall be administered without sale, denial, or delay." (*Davidson v. Jennings*, 49.)

9. **MECHANIC'S LIEN—HOW CREATED.**—A mechanic's or miner's lien is the creature of statute, and attaches only by virtue of work being done or materials furnished under a contract, express or implied, with the owner of the property upon which the lien is claimed. (*Davidson v. Jennings*, 49.)

10. **MECHANIC'S LIEN—MINING CLAIM—ESTOPPEL.**—A part owner of a mining claim, who has no interest in a lease under which the claim is being worked, where the rights of the parties in the property appear of record, is not estopped from claiming that persons who furnished materials for the working of the mine have no lien against his interest, by the facts that he was cognizant of the work being done and took some part in its direction, that he gave some orders for merchandise in the name of the company under which the mine was being operated, and that he failed to give notice to the lien claimants of his true relation to the property. (*Davidson v. Jennings*, 49.)

MINES AND MINING.

1, 2. **MINES—RIGHTS OF LOCATOR.—PREVIOUS TO THE ACT OF CONGRESS OF 1872** relating to mining claims, the rights of a locator were limited to the vein upon which his location was made. The rights to surface ground attached only for the purpose of the convenient working of the vein so located, and no rights to any other vein, except the one upon which the location was made, were given. (*Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 17.)

3. **MINES—CROSS-VEINS—PRIOR CLAIMANT'S RIGHTS.**—Under United States Revised Statutes, section 2336, providing that "where two or more veins intersect or cross each other, priority of title shall govern," such provision refers to the intersection or crossing of veins either upon their strike or dip. (*Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 17.)

4. **MINES—CROSS-VEINS—SPACE OF INTERSECTION.**—Under section 2336 of the United States Revised Statutes relating to the ownership of cross-veins, which provides that the subsequent locator "shall have the right of way through the space of intersection for the purposes of the convenient working of the mine," the "space of intersection" means either the intersection of veins or of conflicting claims, and grants a right of way to the junior claimant through such space for the convenient working of his mine upon the veins which he owns or controls outside of that space. (*Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 17.)

5. **MINES—TUNNEL SITES—RIGHT OF WAY.**—Under section 2323 of the United States Revised Statutes, providing for the running of tunnels for the development or discovery of mines, a tunnel site cannot be projected and its tunnel extended underneath a previous valid, subsisting location, for the purpose of discovering blind leads within such location. (*Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 17.)

6. MINES—TUNNEL SITES—BLIND LEADS—PRIORITY.—The locator of a tunnel site acquires no title to blind leads discovered in his tunnel within the boundaries of a prior valid, subsisting location not known to exist previously to the commencement of the work upon the tunnel. (Calhoun Gold Min. Co. v. Ajax Gold Min. Co., 17.)

7. MINES—PRIORITY OF LOCATION.—ALL RIGHTS conferred by a valid prior location, so long as it remains in full force and effect, are preserved from invasion and cannot be infringed upon or impaired by subsequent locations. (Calhoun Gold Min. Co. v. Ajax Gold Min. Co., 17.)

8. MINES—TUNNEL SITE.—UNDER SECTION 2323 of the United States Revised Statutes a tunnel site can only embrace unappropriated public domain, and no rights are conferred to extend such tunnel through previous valid, subsisting locations. (Calhoun Gold Min. Co. v. Ajax Gold Min. Co., 17.)

9. MINES — TUNNELS — UNDISCOVERED VEINS — PRESUMPTION.—In the absence of any proof to the contrary, the presumption attaches that all veins discovered in that part of a tunnel which extends under a prior valid, subsisting claim belong to the latter claim. (Calhoun Gold Min. Co. v. Ajax Gold Min. Co., 17.)

10. MINES—LOCATION—PATENTS.—AS AGAINST A COLLATERAL ATTACK, the action of the land department in issuing patents to mining claims conclusively settles that all steps necessary to constitute a valid location of such claims had been taken, including the discovery of mineral. (Calhoun Gold Min. Co. v. Ajax Gold Min. Co., 17.)

11. MINES—TUNNELS—ESTABLISHING CHARACTER OF VEINS—TRESPASS.—The locator of a tunnel site who attempts to initiate title to blind veins in his tunnel underneath a valid prior location is a trespasser, and is not entitled to develop such veins for the purpose of establishing their character. (Calhoun Gold Min. Co. v. Ajax Gold Min. Co., 17.)

12. MINES AND MINING—BOUNDARIES—ESTABLISHMENT BY CONSENT.—The consent of an owner of an undivided interest in a mining claim to the establishment of a certain line as a boundary cannot bind his nonconsenting co-owner. (Strickley v. Hill, 786.)

13. MINES AND MINING—BOUNDARIES—ESTABLISHMENT BY PAROL CONSENT.—If adjoining owners and their predecessors in interest occupy land to a given line, treating that as the boundary between their respective lots for twenty years, neither can thereafter claim beyond such line. (Strickley v. Hill, 786.)

14. MINES AND MINING—LOCATORS—CITIZENSHIP.—If it appears that a mine locator, although of foreign birth, had resided within the United States for many years, had served as a soldier in the Civil War of 1863, had been honorably discharged from the army, had exercised the right of the franchise at several elections, had taken an oath that he was over twenty-one years of age, and a naturalized citizen of the United States, and that he would support the constitution thereof, and that he had drawn a pension as a disabled soldier, a finding that he is a naturalized citizen will not be disturbed. (Strickley v. Hill, 786.)

15. MINES AND MINING—LOCATORS—CITIZENSHIP. The rights of a citizen mine locator and of his grantees is not affected by the fact that his colocator is an alien. (Strickley v. Hill, 786.)

16. MINES AND MINING—LOCATORS—CITIZENSHIP. If a citizen and an alien locate a mining claim, not exceeding the

amount of ground allowed to one locator, such location is valid as to the citizen, or to one who has declared his intention to become such, and a conveyance by him through an alien to another citizen conveys a complete title to the claim located, provided all other provisions of the law were complied with, and there are no intervening rights. (*Strickley v. Hill*, 786.)

17. MINES AND MINING—LOCATION BY ALIEN.—An alien who has declared his intention to become a citizen by enlistment in the United States army may locate a mining claim upon unoccupied public domain. (*Strickley v. Hill*, 786.)

18. MINING CLAIM—VIEWING PREMISES—INSTRUCTION. Where a jury, upon viewing mining claims which are in dispute, has pointed out to it by the guide the point where a corner stake of one of the claims would fall, this error is cured by a direction of the court to the jury to disregard what was said by the guide, and told that upon this point nothing could be considered except the evidence introduced in the courtroom. (*Beals v. Cone*, 92.)

19. MINES—EVIDENCE—REBUTTAL—SAMPLES OF ROCK. Where a defendant introduces in evidence samples of rock from a mining shaft which he claimed did not contain mineral, the plaintiff cannot in rebuttal introduce other samples from the same shaft containing mineral, since this does not show that the samples introduced by the defendant were mineral bearing, or that they did not come from this particular mining shaft. (*Beals v. Cone*, 92.)

20. MINING CLAIM—DISCOVERY SHAFT—VEINS IN OTHER SHAFTS.—Under the mining statutes of Colorado a discovery shaft must expose the vein upon which the location is based, and the mere discovery of some other vein in other shafts within the boundaries of the claim cannot supply the absence of the one required to be exposed in the discovery shaft. (*Beals v. Cone*, 92.)

21. MINING CLAIM—DEFINITION.—“CREVICE,” as used in a statute relative to a discovery shaft, means a mineral bearing vein. (*Beals v. Cone*, 92.)

22. MINING CLAIM—ANNUAL ASSESSMENT WORK—BURDEN OF PROOF.—After a valid mining location has been made, the title thus acquired remains so until forfeited or abandoned, whether the annual assessment work required by the act of Congress has been performed or not, and a party seeking to initiate a claim to mining premises already legally located has the burden of proving that the annual labor thereon has not been performed, in order to establish that the ground so located is subject to location. (*Beals v. Cone*, 92.)

23. MINING CLAIM—CANCELLATION OF ENTRY—RES JUDICATA—EVIDENCE.—The cancellation of a mineral entry only is not res judicata on another application for a patent, and the facts found, upon which the cancellation is based, are not admissible to support an adverse claim against a second application for the same premises. (*Beals v. Cone*, 92.)

24. MINING CLAIM.—A JUDGMENT OF THE LAND DEPARTMENT, rejecting an application for a patent and nothing more, leaves the applicant with the same rights as though no application had ever been made. (*Beals v. Cone*, 92.)

25. MINING CLAIM—DISCOVERY OF VEIN—TIME OF LOCATION.—The validity of the location of a mining claim depends primarily upon the discovery of a vein or lode within its limits, and is valid from the time of such discovery only, a discovery not relating back to the date of the original location. (*Beals v. Cone*, 92.)

26. MINING CLAIM.—A VEIN, within the meaning of mining law, is a continuous body of mineral bearing rock in place, in the

general mass of the surrounding formation, and while it must have boundaries, it is not necessary that they be seen, but their existence may be otherwise determined. (*Beals v. Cone*, 92.)

27. MINING CLAIM—VEIN—WHEN DISCOVERED.—AN INSTRUCTION is properly refused which is based upon the theory that a vein of mineral bearing rock is not discovered unless its boundaries are disclosed. (*Beals v. Cone*, 92.)

28. MINING CLAIM—BOUNDARY POSTS—WHERE SET.—A statute, relating to the placing of corner posts to mark the surface boundaries of a mining claim, and providing that if a post falls on precipitous ground, where it is impracticable or dangerous to place it, it may be placed at the nearest practicable point, cannot be invoked, when the setting of a stake at the true corner is merely difficult or inconvenient. (*Beals v. Cone*, 92.)

See Judgments, 4; Mechanics' Liens, 10.

MONOPOLIES.

1. MONOPOLIES—COMBINATION IN RESTRAINT OF TRADE.—A corporation or combination which regulates the credit to be allowed its members, discriminates in the price to be paid for produce against persons not members, controls the delivery of such produce, and provides a penalty by boycott, fine, and suspension, for offending and defaulting members, is in restraint of trade, tends to limit or control the market price of produce, and is illegal. (*Ertz v. Produce Exchange Co.*, 419.)

2. MONOPOLIES—COMBINATION IN RESTRAINT OF TRADE—BOYCOTT—ESTOPPEL.—An ex-member of an unlawful combination in restraint of trade, who participated in the adoption of its constitution and by-laws, is not estopped to maintain an action against such association for damages for being boycotted by it after his expulsion for a violation of such by-laws. (*Ertz v. Produce Exchange Co.*, 419.)

MORTGAGES.

1. MORTGAGES—PLEDGE OF RENTS.—Rents of land accruing after an assignment for the benefit of creditors, and after the assignee has taken possession, belong, as between general creditors and a mortgagee claiming under a mortgage of the land pledging the rents, to the latter when necessary to pay the debt secured by the mortgage. (*Hutchinson v. Straub*, 764.)

2. MORTGAGES—BUILDING ASSOCIATIONS—FORFEITURE OF MEMBER'S STOCK.—If, in a proceeding brought by an assignee for authority to sell land, a building association, the mortgagee of such land, files an answer and cross-petition, such action is not an election to forfeit the stock of the mortgagor, nor does it estop it from claiming fines for the nonpayment of dues accruing after the assignment. (*Hutchinson v. Straub*, 764.)

3. LIENS OF MORTGAGE AND OF JUDGMENT—PRIORITY.—If, when a mortgage is executed and recorded, no judgment against the mortgagor appears on the judgment docket, the lien of the mortgage is prior to that of an undocketed judgment then existing against the mortgagor, though it had been filed with the clerk of the court and some entries concerning it had been made in the court records. (*McKenna v. Van Blarcom*, 895.)

4. LIENS OF JUDGMENT—TACKING OF—DEFEAT OF MORTGAGE LIEN.—If a judgment creditor, several months after the expiration of the lien of his judgment, obtains and docketes a

new judgment, he cannot tack the two liens and thus make a continuous one which will have priority over the lien of a mortgage, which existed between the expiration of the old judgment lien and the inception of the new one. (*McKenna v. Van Blarcom*, 895.)

5. **MORTGAGES — FORECLOSURE — DERIVATION OF POWER TO SELL.**—The authority of the sheriff to sell mortgaged real estate under foreclosure proceedings is derived from the decree of foreclosure, and not from the order of sale issued by the clerk of the court. (*Passumpsic Sav. Bank v. Maulick*, 539.)

6. **A MORTGAGEE HAS TWO REMEDIES**, one upon the bond or other evidence of indebtedness, and the other by a suit upon the mortgage. The operation of the statute of limitations against one of these remedies does not necessarily affect the other. (*Colton v. Depew*, 650.)

7. **SUIT BY MORTGAGEE, WHEN ACTION UPON THE DEBT IS BARRED.**—The fact that the statute of limitations prevents a mortgagee from maintaining an action upon the bond or other evidence of indebtedness to secure the payment of which the mortgage was given, does not prevent him from prosecuting with success a suit to foreclose the mortgage. (*Colton v. Depew*, 650.)

8. **THE STATUTE OF LIMITATIONS AGAINST A SUIT BY A MORTGAGEE** does not begin to run until the possession becomes adverse to him. The possession of the mortgagor by the sufferance or forbearance of the mortgagee cannot become adverse until the mortgagor ceases to recognize the mortgagee's title by the payment of interest. Such payment is plenary evidence that, up to that time, the possession of the mortgagor had not become adverse. (*Colton v. Depew*, 650.)

9. **A STATUTE OF LIMITATIONS DOES NOT OPERATE AGAINST A SUIT TO FORECLOSE A MORTGAGE** until the mortgagee's legal right of entry upon the lands mortgaged, as well as his right of action upon the debt, is barred. (*Colton v. Depew*, 650.)

See Attorney and Client, 10; Fixtures; Receivers, 5; Records.

MUNICIPAL CORPORATIONS.

1. **MUNICIPAL CORPORATIONS—CONTRACTS.—THE PLEA OF ULTRA VIRES** may be interposed by a municipal corporation, in an action against it upon a contract which it had no power to make. (*State v. Pullman*, 836.)

2. **MUNICIPAL CORPORATIONS — ULTRA VIRES CONTRACT.**—When a town is prohibited by statute to contract for an extension of its water system, whereby an indebtedness is created, without the assent of three-fifths of its voters, and the statute requires public works, where the expenditure exceeds the sum of one hundred dollars, to be done by contract, and let to the lowest responsible bidder, the town has no authority, without the assent of its voters, to enter into a contract to purchase water pipe laid outside of the town limits, at a price in excess of two thousand dollars, and to supply water to any person or corporation beyond the limits of the town. Such a contract is ultra vires. (*State v. Pullman*, 836.)

3. **MUNICIPAL CORPORATIONS—ULTRA VIRES—ESTOPPEL.**—The fact that a municipal corporation has received the benefit of a contract made by it, which is absolutely ultra vires, does not estop it from denying the validity of the contract. (*State v. Pullman*, 836.)

4. MUNICIPAL CORPORATIONS—ILLEGAL CONTRACTS—RATIFICATION.—A contract of a municipal corporation, which is illegal for want of authority to make it, cannot be ratified. (*State v. Pullman*, 836.)

5. STREETS—DEDICATION OF—SALE OF LAND BY PLAT. Where lots have been sold by reference to a plat representing a division of a large tract of land into subdivisions of streets and lots, the purchaser of a lot acquires a right to have all and each of the ways and streets on the plat kept open. (*Collins v. Asheville Land Co.*, 720.)

6. MUNICIPAL CORPORATIONS — USE OF STREETS — RIGHT TO COMPENSATION.—A municipal corporation has no private proprietary interest in its streets which entitles it to compensation when they are subjected to an authorized additional public use by the construction of a telephone line thereon, beyond an amount sufficient to make the repairs rendered necessary by such additional use. (*Zanesville v. Zanesville Tel. etc. Co.*, 725.)

7. MUNICIPAL CORPORATIONS—RUNNING OF TRACTION-ENGINE—VOID ORDINANCE.—A city has no power to prohibit traction-engines, or other vehicles not propelled by animal power, from being run upon its streets and alleys. An ordinance containing such a prohibition is not a reasonable exercise of the city's grant of power over its streets and alleys, and is void. (*Bogue v. Bennett*, 212.)

8. MUNICIPAL CORPORATIONS—USE OF STREETS AND BOULEVARDS.—The primary purpose of a street is to accommodate public travel. But whenever any portion of a street not used for business purposes can be set apart for park or boulevard purposes without any impairment of such primary purpose, the municipality may set apart such portion for boulevards or other similar purposes. (*McDonald v. St. Paul*, 428.)

9. MUNICIPAL CORPORATIONS—USE OF STREETS AND BOULEVARDS—CARE REQUIRED.—If a city sets apart and improves a portion of a street for a boulevard, it is not bound to use due care to keep such portion free from all obvious obstructions necessarily incident to its use as a boulevard. (*McDonald v. St. Paul*, 428.)

10. MUNICIPAL CORPORATIONS — BOULEVARDS — OBSTRUCTIONS—NEGLIGENCE.—A city has no right to maintain, nor to permit others to maintain, on its boulevards, and especially on those at street corners, anything in the nature of a dangerous pitfall, trap, snare, or like obstruction, such as a stretched wire, whereby a traveler may be injured. Its negligence in so doing, when the facts present a fair question upon which reasonable men might differ, is for the jury to determine. (*McDonald v. St. Paul*, 428.)

11. MUNICIPAL CORPORATIONS—LIABILITY FOR INJURIES IN STREET.—A city is not liable for an injury to one who, upon a dark night, by reason of the deceptive appearance of snow and water which fill a catch-basin, at the corner of a sidewalk, up to the level of the walk, steps off the sidewalk, slips on an iron plate properly placed over the catch-basin, and is injured. (*Spillane v. Fitchburg*, 262.)

12. MUNICIPAL CORPORATIONS—LIGHTING.—A city is not bound to light its streets. (*Spillane v. Fitchburg*, 262.)

13. EVIDENCE OPINION CONDITION OF STREET.—Where the evidence shows that there had been no change in the condition of a street, and there was no controversy about it, it is proper to

exclude the opinion of a witness that the street was not properly constructed. (*Spillane v. Fitchburg*, 262.)

14. **MUNICIPAL CORPORATIONS—DANGEROUS SEWER—PERSONAL INJURY—LIABILITY FOR LICENSEE'S NEGLIGENCE.**—Although a company, in the construction of a sewer for a city, leaves the street so obstructed as to be inconsistent with public use, this does not exempt the city from liability for an injury to a person who falls into an uncovered manhole in the sewer, if it is shown that it had notice, or might have had by the exercise of proper oversight, that its licensee had acted in a negligent manner and left its streets in an unsafe and dangerous condition. (*South Bend v. Turner*, 200.)

15. **NEGLIGENCE—ANSWERS TO INTERROGATORIES—MOTION FOR JUDGMENT UPON—WHEN PROPERLY OVERRULED.**—In an action by a child, six and a half years of age, against a city and a construction company, for personal injuries sustained by the plaintiff in falling into an uncovered manhole in a sewer constructed by the company for the city, a motion by the city for judgment on answers to interrogatories, on the ground that such answers show that the plaintiff was guilty of contributory negligence, is properly overruled, where it is shown that the plaintiff was playing on a sand pile in the street near the manhole; that the hole had been left continuously, for two weeks, uncovered, with the knowledge of defendants; that children were attracted to the place for the purpose of play; and that the plaintiff, at the time of the accident, did not have intelligence enough to know the danger of the open manhole. (*South Bend v. Turner*, 200.)

16. **A MUNICIPAL CORPORATION IS NOT RESPONSIBLE** for those incidental damages which result from the proper exercise of its functions, and such exercise will not subject it to the charge of maintaining a public nuisance. (*Grey v. Mayor etc.*, 642.)

17. **A MUNICIPAL CORPORATION SITUATE UPON A NAVIGABLE, TIDAL STREAM** has no rights in the waters thereof distinct from the rights of the general public, nor does the legislative permission to it to withdraw such quantity of water as may be necessary to furnish a pure and wholesome supply, create a right which is beyond the power of the legislature to subsequently impair by authorizing another municipal corporation to construct sewers and drains into, and hence pollute the waters of, such stream. (*Grey v. Mayor etc.*, 642.)

18. **A MUNICIPAL CORPORATION CANNOT BE AUTHORIZED** by the legislature to pollute a fresh-water stream, or a stream above the ebb and flow of the tide to the injury of riparian owners thereon. (*Grey v. Mayor etc.*, 642.)

19. **MUNICIPAL CORPORATIONS.—THE RIGHT TO CONSTRUCT SEWERS DRAINING INTO AN ADJOINING NAVIGABLE, TIDAL STREAM** is conferred on a municipal corporation by statutes empowering it to pass all such ordinances as its common council shall deem necessary for the purpose of regulating the streets and causing sewers and drains to be made in any part of the city, and to take property and use all such lands, waters, and streams within and adjacent to the city as may be necessary to drain and carry off the water from the streets, lanes, alleys, and grounds of the city. (*Sayre v. Mayor etc.*, 629.)

20. **MUNICIPAL CORPORATIONS—RIGHT TO USE NAVIGABLE, TIDAL STREAMS FOR SEWERAGE PURPOSES.**—The legislature has the right to authorize a municipality of the state to use tidal, navigable streams within its borders for sewerage

purposes, though such use causes some defilement. The degree of pollution to be permitted is a matter over which the legislature has full control. (*Sayre v. Mayor etc.*, 629.)

21. PUBLIC TIDAL WATERS—POLLUTION OF BY A MUNICIPAL CORPORATION—LAND OWNER'S RIGHTS.—One whose lands front upon public, navigable, tidal waters cannot enjoin the pollution of such waters by the sewers of a municipal corporation if its acts are authorized by statute, for if a corporation, whether public or private, in the reasonable exercise of a franchise granted to it for public purposes, causes incidental damage to private property, such damage is *damnum absque injuria*. (*Sayre v. Mayor etc.*, 629.)

See Constitutional Law, 38-42.

NATURALIZATION.

NATURALIZATION—RECORDS OF—PROOF, WHEN LOST. The general rules that when a record has been lost or destroyed, or by lapse of time, or by the death of a person naturalized, and the record cannot be produced, secondary evidence is admissible to prove the naturalization, and proof that a person served in the United States army and was honorably discharged therefrom has a strong tendency to show a declaration of intention to become a citizen, as well as being a strong circumstance tending to show naturalization. (*Strickley v. Hill*, 786.)

NAVIGABLE WATERS.

See Waters and Watercourses.

NEGLIGENCE.

1. NEGLIGENCE.—WHERE NO DUTY is owed there cannot be negligence. (*Welch v. Walsh*, 302.)

2. NEGLIGENCE—WHEN QUESTION OF LAW.—If the evidence is not in conflict, and but one reasonable inference can be drawn from the facts, the question of negligence arising from such facts is one of law, to be declared by the court. (*Heinmann v. Kinnare*, 123.)

3. NEGLIGENCE — CONTRIBUTORY — INFANT TRESPASSER.—A trespassing boy, between thirteen and fourteen years of age, of ordinary intelligence, knows as well as a man that a deep pond is not a safe place upon which to go when the ice thereon is broken at the edge and covered with water. If, with the knowledge of such danger, he carelessly and recklessly goes upon such pond and loses his life by drowning, he is guilty of contributory negligence, as a matter of law, and his age does not excuse him. (*Heinmann v. Kinnare*, 123.)

4. NEGLIGENCE—CONTRIBUTORY—INFANTS.—If injury to a minor comes from a danger fully comprehended by him and of which he assumes the risk, having the capacity to comprehend and avoid danger, he may be guilty of contributory negligence as matter of law, which will bar recovery for the injury thus received. (*Heinmann v. Kinnare*, 123.)

5. CONTRIBUTORY NEGLIGENCE PRESUPPOSES NEGLIGENCE, and can exist only as a co-ordinate or counterpart. (*Martin v. Highland Park Mfg. Co.*, 671.)

6. NEGLIGENCE CAUSING DEATH — DAMAGES FOR, FOUNDED ON DECEASED'S INABILITY TO PERFORM A CONTRACT.—Though a passenger of a railway company is killed

through its negligence, the fact that he is thereby prevented from carrying out the terms of a contract, by which he is to contribute a certain amount of his earnings monthly to the support of his parents, does not give the parents a cause of action against the railway company, where it was not a party to the contract and not in any way interested therein. (*Brink v. Wabash R. R. Co.*, 459.)

7. NEGLIGENCE—INJURY TO CHILD FROM DANGEROUS PREMISES—PLEADING.—In an action to recover for the death of a child caused by playing with fire set by a railroad company upon its right of way, upon the ground that the right of way was not fenced, and also that the fire was left unguarded, a complaint which does not allege any facts showing that the child went upon the right of way at any point which it is alleged was not fenced, or at any point which the company might lawfully have protected by a fence, does not state a cause of action. (*Erickson v. Great Northern Ry. Co.*, 410.)

8. NEGLIGENCE—INJURY TO CHILD FROM DANGEROUS PREMISES.—A railroad company does not owe any legal duty to children or others, to exercise extraordinary care by guarding fires set upon its right of way, so that if being attracted thereby they intrude upon the right of way to play with the fire, they shall not be injured thereby. The doctrine of the "turntable cases" does not apply to such a case, and must be limited to cases of attractive and dangerous machinery, and to other similar instances where the danger is latent. (*Erickson v. Great Northern Ry. Co.*, 410.)

See Conflict of Laws.

NEGOTIABLE INSTRUMENTS.

1. NEGOTIABLE INSTRUMENTS.—NO INSTRUMENT IS A NOTE, either negotiable or non-negotiable, which does not provide for payment absolutely and unconditionally. (*Chicago Trust etc. Bank v. Chicago Title etc. Co.*, 138.)

2. NEGOTIABLE INSTRUMENT—WHAT IS NOT.—An instrument by which the maker agrees to pay to the order of the payee a certain sum "on or before one year after date of the completion of the piling and filling," of certain premises, "according to the requirement of a certain agreement of even date therewith, the date of said completion of piling and filling to be determined by the board of commissioners," is not a note and cannot be reissued by the maker, as can a note, nor can such instrument be assigned by simple indorsement. (*Chicago Trust etc. Bank v. Chicago Title etc. Co.*, 138.)

3. NEGOTIABLE INSTRUMENTS.—MERE INDORSEMENT DOES NOT OPERATE TO TRANSFER or assign a non-negotiable instrument, nor does the title to such instrument, thus indorsed, pass by mere delivery. (*Chicago Trust etc. Bank v. Chicago Title etc. Co.*, 138.)

4. NEGOTIABLE INSTRUMENTS—NO CONSIDERATION—ANSWER OF—WHEN INSUFFICIENT.—In an action by indorsees on a negotiable note, where the defense of fraud, among others, is set up, an answer of "no consideration," without alleging that the plaintiffs had notice of the invalidity of the note, is insufficient. (*Shirk v. Neible*, 150.)

5. NEGOTIABLE INSTRUMENTS—DEFENSE OF FRAUD—BONA FIDE HOLDER—BURDEN OF PROOF.—If the holder of paper, negotiable by the law merchant, and to which the maker has exhibited a valid defense for fraud, relies upon the fact that he is a bona fide holder thereof, for value, the burden is upon him to

aver and prove that he obtained such paper before maturity without notice of the defenses of the maker, and that he paid a valuable consideration therefor. (*Shirk v. Neible*, 150.)

6. **NEGOTIABLE INSTRUMENTS—PURCHASER—PROTECTION OF.**—A purchaser of a negotiable instrument is not entitled to protection as a bona fide purchaser in good faith without notice, if he had such credible information, or was placed in such a situation as would have put a reasonable man upon inquiry, and which, if made, would have disclosed the defenses thereto. (*Shirk v. Neible*, 150.)

7. **NEGOTIABLE INSTRUMENTS — NOTICE SUFFICIENT TO PUT PURCHASER UPON INQUIRY.**—If one who purchased a note of three thousand dollars, secured by a mortgage, knew that the maker and his two sons had been arrested several months previously on a charge of murder; that they had been examined before a committing magistrate; that the father had been discharged and his two sons bound over to await the action of the grand jury; that the note and mortgage were executed while the sons were in jail; and that the payee of the note was a firm of attorneys who represented the parties at such preliminary examination, these facts, considered in connection with the failure of the grand jury to indict the boys, and their discharge, facts occurring in the same town, were sufficient notice of the consideration of the note to have put the purchaser upon inquiry. (*Shirk v. Neible*, 150.)

8. **NEGOTIABLE INSTRUMENTS—NOTICE OF CONSIDERATION—FINDING.**—When an indorsee brings an action on a negotiable note and the maker pleads a want of consideration, a finding that the plaintiff had no "actual" knowledge of the consideration for which the note was given is not equivalent to a finding that the plaintiff had "no" notice of the consideration and defenses. (*Shirk v. Neible*, 150.)

9. **NEGOTIABLE INSTRUMENTS—PLEA OF NO CONSIDERATION FAILS, WHEN—FRAUD—FAILURE OF CONSIDERATION.**—In an action on a negotiable instrument, an answer of no consideration fails if it is shown that there was any consideration whatever for the note, but an answer of fraud, or failure of consideration, travels upon an entirely different theory. (*Shirk v. Neible*, 150.)

See Bankruptcy, 1; Banks and Banking; Corporations, 5; Guaranty.

NEWSPAPER.

1. **NEWSPAPER—WHAT IS.**—A weekly publication, circulating among various classes of persons within the county and state, and containing printed matter consisting principally of legal notices and information regarding courts, and of legal matters in general, but also advertisements of a general character, literature of a general kind, and a limited amount of news of current events, is a newspaper. (*Hanscom v. Meyer*, 507.)

2. **NEWSPAPER—WHAT IS.**—Although a weekly printed publication makes a specialty of some particular class of business, and conveys intelligence of particular interest to those engaged therein, this does not deprive it of its general classification as a newspaper, provided it has the distinguishing features required to make it a newspaper as ordinarily defined, such as news items and advertisements of a varied character intended for the information of the general reader. (*Hanscom v. Meyer*, 507.)

3. **NEWSPAPERS.—THE DISTINGUISHING FEATURES OF** a newspaper are that it must be a publication, appearing at regular

or almost regular intervals, at short periods of time, as daily or weekly, usually in sheet form, and contain news—that is, reports of recent occurrences, political, social, moral, religious, and items of a varied character, both local and foreign, intended for the information of the general reader. (*Hanscom v. Meyer*, 507.)

See Contempt.

NEW TRIAL.

1. **NEW TRIAL.—NEWLY DISCOVERED EVIDENCE** which only goes to impeach the credit or character of a witness is not sufficient ground for a new trial, except it is clear that such impeachment would have resulted in a different verdict. (*Beals v. Cone*, 92.)

2. **NEW TRIAL.—THE MERE SEPARATION OF A JURY**, after the submission of a cause, is not per se sufficient for setting aside the verdict and granting a new trial, unless it appears that by reason of such separation, there is a strong probability that the jury has been tampered with, or improperly influenced to return the verdict which is sought to be set aside. (*Beals v. Cone*, 92.)

NOTICE.

NOTICE NOT SEASONABLY GIVEN, BUT ACTED UPON WITHOUT OBJECTION, IS A WAIVER of the condition as to the time in which it should have been given. (*Sheppard v. Rosenkrans*, 886.)

See Newspaper.

NOVATION.

See Contracts, 9.

NUISANCE.

A PUBLIC NUISANCE CAN BE ABATED ONLY BY A PUBLIC OFFICER, except where the party who desires to abate it has some special interest in the abatement which is different from, and greater than, the interest of the community. (*Griffith v. Holman*, 821.)

OFFICERS.

1. **OFFICERS—OFFICIAL BONDS—EXECUTION ON CONDITION**.—If a surety signs an official bond upon the express condition that it shall not be delivered until certain others shall be procured to sign and execute it, and such condition is brought to the knowledge of the obligee, delivery without a compliance with such condition is ineffectual to give validity to the bond as to such sureties. Such condition must, however, in all cases, be brought to the notice of the obligee before delivery of the bond. Otherwise the surety is not released by a breach of the condition. (*Board of Education v. Robinson*, 374.)

2. **OFFICERS—OFFICIAL BONDS—LIABILITY OF SURETIES—SUCCESSIVE TERMS OF OFFICE**.—If a person holds a public office for two or more successive terms, and executes a new bond with new sureties for each term, and a defalcation occurs on the part of the officer, the sureties on the bond given for the term during which the defalcation occurs are alone liable. If, however, such officer fails to account for and pay over to his successor the funds chargeable to him as shown by his books and final account,

the sureties on the last bond are *prima facie* liable therefor, and, to relieve themselves, must show that the defalcation in fact occurred during a prior term. (*Board of Education v. Robinson*, 374.)

3. OFFICERS—OFFICIAL ACTS—LIABILITY ON BOND.—If a county judge orders an administrator to pay money into court and the latter does so, and the county judge receives the money, it is, on his part, an official act, and he is liable therefor upon his official bond. (*Barker v. Wheeler*, 541.)

4. OFFICERS—BONDS—JUDGMENT AGAINST OFFICER AS EVIDENCE AGAINST SURETY.—A judgment against an officer is *prima facie* evidence against his sureties when sued upon the officer's official bond for the same cause of action. (*Barker v. Wheeler*, 541.)

5. OFFICERS—BONDS OF—JUDGMENT AGAINST OFFICER AS EVIDENCE AGAINST SURETIES.—A judgment against an officer is conclusive evidence of the liability of his sureties when served upon their bond, only in case they agree to abide by any judgment that may be rendered against their principal. (*Barker v. Wheeler*, 541.)

6. OFFICERS—OFFICIAL MISCONDUCT—LIABILITIES OF SURETIES.—An officer who receives money in his official capacity and converts it to his own use is guilty of official misconduct, for which the sureties on his official bond are liable. (*Barker v. Wheeler*, 541.)

7. OFFICERS—OFFICIAL MISCONDUCT—EVIDENCE OF DATE OF.—In an action against sureties on an official bond for money embezzled by their principal during his term of office, evidence to show the date of the embezzlement is admissible under a general denial. (*Barker v. Wheeler*, 541.)

8. SHERIFFS—LIABILITY FOR TRESPASS—OFFICIAL AND INDEMNITY BONDS.—When a sheriff has committed a trespass in seizing property not subject to his process, the claimant may proceed either against him and his sureties on his official bond, or against the obligors on his bond of indemnity. (*Martin v. Buffalo*, 679.)

9. SHERIFFS—TRESPASS—LIABILITY OF BONDSMEN.—The liability of the signers of a sheriff's indemnity bond to him whose property has been wrongfully seized is in tort, by reason of their being cotrespanders with the sheriff. (*Martin v. Buffalo*, 679.)

10. SHERIFFS—SURETIES ON BOND—RELEASE.—A sheriff cannot release the sureties on his indemnity bond from liability to one whose property has been wrongfully seized. (*Martin v. Buffalo*, 679.)

11. SHERIFFS—WRITTEN NOTICE TO BONDSMEN.—A notice given by the sheriff to the sureties on his indemnity bond that he has been sued is not a judicial notice, and therefore does not need to be in writing. (*Martin v. Buffalo*, 679.)

See Constitutional Law, 11, 12; Elections.

OWNERSHIP.

See Evidence, 5.

PARTIES.

PARTIES—DEFECT IN—OBJECTION—WAIVER.—A defect in parties appearing on the face of the complaint must be objected to by demurrer, or it is waived. (*Mason v. St. Paul etc. Ins. Co.*, 433.)

PARTNERSHIP.

1. **INSOLVENCY—PARTNERSHIP—SETOFF.**—The claim of an insolvent creditor against an insolvent corporation may be proved without allowing as a setoff a debt due such corporation from an insolvent partnership of which the creditor is a member. (Very v. Clarke, 260.)

2. **INSOLVENCY—PARTNERSHIP—CLAIM AGAINST SEPARATE ESTATE OF PARTNER.**—A debt due from an insolvent partnership can be proved against the separate estate of one partner, who is also insolvent, only in subordination to the claims of his separate creditors. (Very v. Clarke, 260.)

PAYMENT.

See Banks.

PENALTY.

See Constitutional Law, 37.

PETIT LARCENY.

See Larceny, 3.

PHOTOGRAPH.

See Evidence, 7.

PHYSICAL EXAMINATION.

See Appeal, 8; Trial, 1-3.

PHYSICIANS.

1. **PHYSICIANS AND SURGEONS—STATUTE REGULATING THE PRACTICE OF MEDICINE—CONSTRUCTION OF.**—A statute regulating the practice of medicine, which provides for a board of examiners, standards of qualification, examinations, licenses to those qualified, and penalties for practicing without a license, is a preventive, not a compulsive, measure. The licensee is not bound to practice on any other terms than such as he may choose to accept. (Hurley v. Eddingfield, 198.)

2. **NEGLIGENCE CAUSING DEATH—REFUSAL TO RENDER MEDICAL ASSISTANCE—ACTION FOR DAMAGES.**—A licensed physician is not bound to enter into a contract of employment to render professional service to everyone who applies, and is not, therefore, answerable in damages for the death of a person, caused by refusal to render medical assistance. (Hurley v. Eddingfield, 198.)

See Agency.

PLEADING.

1. **EQUITY—AMENDMENT OF PLEADING—RIGHT TO ANSWER.**—If a bill in equity is formally amended by merely adding a new party defendant, after the answer has been put in, the original defendant, if he then answers, can answer only as to new matter introduced by the amendment, and cannot put in an answer making an entirely new defense. (Casserly v. Wayne Circuit Judge, 320.)

2. EQUITY PLEADING — ALLEGATION OF INJURY TO PLAINTIFF.—A bill in equity which states all the facts necessary to give the court jurisdiction, damage to the plaintiff being the necessary result of the facts stated, is not demurrable upon the ground that it fails to set forth that the plaintiff has been injured. (Boston etc. R. R. v. Sullivan, 275.)

See Corporations, 1-3; Estoppel, 3-5.

PLEDGES.

PLEDGES — THEFT OF PROPERTY — BURDEN OF PROOF.—A pledgee of personalty as security for a loan must exercise ordinary care in protecting it from theft. The burden of proof is upon him to show such care. (Ware v. Squyer, 390.)

POLICE POWER.

See Constitutional Law, 18-31.

POLLUTION OF WATERS.

See Municipal Corporations, 17-21.

POOL-SELLING.

See Constitutional Law, 14-17.

PRINCIPAL AND AGENT.

See Agency.

PROCESS.

PROCESS — WHEN CURED BY AMENDMENT.—Process defective for want of the seal of the court may be cured by amendment. (Passumpsic Sav. Bank v. Maulick, 539.)

See Corporations, 8.

PURE FOOD LAWS.

See Constitutional Law, 28-31.

QUO WARRANTO.

QUO WARRANTO—CONTESTED ELECTION—JURISDICTION.—WHERE THE ATTORNEY GENERAL refuses to bring an action to oust one who, he has reason to believe, unlawfully holds a state office, the person claiming to be elected to such office may, upon leave of court, bring an action in quo warranto in the name of the state on his own relation, where he has no other remedy. (State v. Sadler, 573.)

RAILROADS.

1. RAILROADS — FELLOW-SERVANTS — EMPLOYÉ RIDING FREE.—An employé of a street railway company, who is riding free on the platform of a street-car under a rule of the company allowing him so to ride, and who at the time does not stand in the relation of a servant to the company, his time being his own, and he owing the company no duties until the time arrived for resuming his work, is not a fellow-servant of the motorman who operates the car. (Dickinson v. West End St. Ry. Co., 284.)

2. **RAILROADS—TICKETS—TIME LIMITATION.**—The purchaser of a railroad passenger ticket must take notice of the time limitation printed or stamped on its face or back. A limit of one day is reasonable and valid. (*Coburn v. Morgan's etc. R. R. Co.*, 242.)

3. **RAILROADS—PERSON ON CONSTRUCTION TRAIN BY INVITATION—DEGREE OF CARE REQUIRED.**—If a person is on a construction train by the implied invitation of the railway company, it owes him the duty of ordinary care in the management of the train. (*Mathews v. Great Northern Ry. Co.*, 383.)

4. **RAILROADS—STREETS—PLACES OF DANGER.**—Open spaces between railroad tracks on a public street, left unimproved and occupied by railroad tracks to the exclusion of other vehicles, with the consent of the city council, are places of danger, and persons occupying them are neither trespassers nor licensees. It is the duty of the railroad company to use proper care and take necessary precautions to prevent injury to persons occupying such open spaces. (*Lampkin v. McCormick*, 245.)

5. **RAILROADS—CONTRIBUTORY NEGLIGENCE OF PERSON INJURED.**—Railroad companies operating trains through danger points in the streets of a city must use proper care for the safety of persons upon such streets, and if the companies entirely fail in this regard they must respond in damages for injuries to persons caused by them, although such injuries are due to some extent to the imprudence and forgetfulness of the person injured. The fact that if the duty of care and caution owing from the railroad company had been performed in the particular case, it would have been unavailing to prevent the injury, is immaterial and cannot be set up as a defense. (*Lampkin v. McCormick*, 245.)

6. **RAILROADS—DUTY TO LOOK AND LISTEN.**—The known presence of a railway track is itself notice of the momentary peril of a passing train at all times, and the duty to look and listen is not relaxed by any opportunity for theorizing, or difference of opinion, as to whether a train is or is not likely to pass. (*Guhl v. Whitcomb*, 889.)

7. **RAILROADS—THE DUTY TO LOOK AND LISTEN IS ABSOLUTE**, where the opportunity exist, and no "diversion of attention" will excuse an omission to do so, except in cases where the attention is so irresistibly forced to something else as to deprive the traveler of the opportunity to perform that duty. (*Guhl v. Whitcomb*, 889.)

8. **RAILROADS—NEGLIGENCE IN OMITTING TO LOOK FOR TRAIN—WHAT IS.**—If a girl between nineteen and twenty years of age comes up to the crossing of a north and south highway with a railroad, which runs so nearly north and south that the angle of crossing is only sixteen degrees, and looks to the northward, where she observes a freight train more than a third of a mile away, and needlessly steps on the track, looking continuously to the northward but without looking, or having looked, when near the track, to the southward, where she would have a clear view for a long distance, when she is struck and injured by a passenger train running northward at a high rate of speed, it must be held that she was negligent in omitting to look for a train from the south. (*Guhl v. Whitcomb*, 889.)

See Carriers.

RAPE.

1. **RAPE.—AN INDICTMENT** for rape need not specify the sex of the defendant nor that the person ravished was not his wife. (*State v. Williamson*, 780.)

2. RAPE—EVIDENCE OF CHASTITY OF PROSECUTRIX. In a prosecution for rape, evidence of want of chastity in the prosecutrix is not admissible. (*State v. Williamson*, 780.)

REASONABLE DOUBT.

See Criminal Law, 5.

RECEIVERS.

1. RECEIVERS.—THE POWER OF COURTS OF EQUITY TO CONTINUE A BUSINESS under a receiver and to make his charges and expenses a charge upon the property must be exercised with great caution. (*Makeel v. Hotchkiss*, 131.)

2. RECEIVERS—COSTS OF RECEIVERSHIP AS LIEN.—A receiver's charges, disbursements, and expenses in running the business under receivership cannot be made a lien upon the property superior to the rights of the holder of a deed under a foreclosure sale, where the mortgagee was not made a party to the receivership suit involving only the equity of redemption and the amount realized at the foreclosure sale is sufficient to pay only the mortgage debt and costs. (*Makeel v. Hotchkiss*, 131.)

3. RECEIVERS—EXPENSES AS LIEN—ESTOPPEL.—If a receiver of property, pending the determination of the ownership of the equity of redemption therein, is made a party only in his individual capacity to a foreclosure proceeding in another court, and files an answer stating that his possession held under a lease, as well as his rights, are subject to the mortgage and decree foreclosing it, he is estopped, after the decree and sale, to assert any lien in his own behalf, superior to the lien of the mortgage. (*Makeel v. Hotchkiss*, 131.)

4. RECEIVERS—CORPORATIONS.—A receiver should not be appointed in an action by a simple contract creditor against a debtor corporation to prevent such corporation from fraudulently disposing of its property, and putting beyond its power the ability to respond to a judgment sought to be obtained on an unsecured debt. (*International Trust Co. v. United Coal Co.*, 59.)

5. RECEIVERS—RAILROADS—INDEBTEDNESS INCURRED—PRIOR LIENS—MORTGAGE.—Pending a suit to foreclose a mortgage executed by a railroad company, the road may be operated by a receiver, and the expenses of the operation incurred by him may be made a first lien upon the income, and if that is not sufficient for the purpose, then upon the corpus of the property, superior to that of the prior mortgage. (*International Trust Co. v. United Coal Co.*, 59.)

6. RECEIVERS—INSOLVENT CORPORATION—OPERATING EXPENSES—LIENS.—In administering the affairs of an ordinary insolvent private business corporation for which a receiver has been appointed, a court of equity has no power to authorize the receiver to incur indebtedness for carrying on the business, and to make the same a first and paramount lien upon the corpus of the property superior to that of prior lienholders without their consent. (*International Trust Co. v. United Coal Co.*, 59.)

7. RECEIVERS — PRIVATE CORPORATIONS — INDEBTEDNESS—PARAMOUNT LIEN.—While the business of a private corporation may be temporarily carried on by a receiver, the obligations that he may incur that may be made a paramount lien on the corpus of the property are limited to such obligations as have been contracted for, and as relate to, the preservation of the status of the property at the time of the appointment of the receiver. (*International Trust Co. v. United Coal Co.*, 59.)

8. RECEIVERS — PRIVATE CORPORATIONS — LIENS—ESTOPPEL.—When a receiver of a private corporation has been appointed in a suit by an unsecured creditor, a trustee and bondholders secured by mortgage who are not made parties to the suit, but who know of the receivership and the manner of conducting the business and make no objection thereto, and who do not bring a suit to foreclose their mortgage, are not estopped from objecting that the receiver's certificates issued for operating expenses shall be made a lien on the property of the corporation prior to their mortgage, when the holders of such certificates had notice of the rights of the trustee and bondholders, and were not misled by any conduct of the trustee or of the bondholders, and whenever there was an occasion they all objected to any action that in any wise impaired their prior lien. (*International Trust Co. v. United Coal Co.*, 59.)

RECORDS.

RECORDS—SEARCH FOR JUDGMENT LIENS—DILIGENCE.—A person offering a mortgage for record is not required to examine all the records in the clerk's office for judgment liens. If the judgment docket shows a clear record he need not seek any further. (*McKenna v. Van Blarcom*, 895.)

RELIGIOUS SOCIETY.

1. RELIGIOUS SOCIETIES — SPIRITUAL OFFENSES — JURISDICTION.—A SECULAR COURT will not assume jurisdiction over spiritual offenses. As to them, the decision of the spiritual court is final and will be accepted as conclusive by the secular court, except where there has been a usurpation of power. (*Hatfield v. De Long*, 194.)

2. RELIGIOUS SOCIETIES—EXPULSION FOR SPIRITUAL OFFENSE—INJUNCTION.—An appellate tribunal of a religious society, which tribunal is not organized in conformity with the laws of the church, may be enjoined from expelling a member of the church on the charge of a spiritual offense. (*Hatfield v. De Long*, 194.)

RENT.

See *Landlord and Tenant*.

REPLEVIN.

See *Suretyship*, 6.

RES JUDICATA.

See *Judgments*, 1-4.

RESTRAINT OF TRADE.

See *Monopolies*.

RETROACTIVE LAW.

See *Evidence*, 8.

REVENUE STAMPS.

INTERNAL REVENUE STAMPS — UNSTAMPED DOCUMENT AS EVIDENCE—STATE COURTS.—The provision of the war revenue act of Congress approved June 13, 1898, that no document required by law to be stamped shall be admitted in evidence

until a legal stamp has been affixed thereto, applies to those courts only which have been established under the constitution of the United States and by acts of Congress, over which Congress can legitimately exercise control, and does not apply to state courts. (*Knox v. Rossi*, 566.)

SALES.

1. **SALES ON BOARDS OF TRADE—SUBMISSION TO RULES.**—A person who authorizes a broker to make a sale for him on a board of trade impliedly submits himself to the lawful rules of the organization. (*Bartlett v. Collins*, 928.)

2. **SALE AND DELIVERY OF WHEAT—TIME CONTRACT—GAMBLING TRANSACTION—BURDEN OF PROOF.**—A party who claims a right under a time contract for the sale and delivery of wheat must make it affirmatively and satisfactorily appear that the contract was made with an actual view to the delivery and receipt of the grain, and not as a cover for a gambling transaction. (*Bartlett v. Collins*, 928.)

3. **SALE AND DELIVERY OF WHEAT—TIME CONTRACT—GAMBLING TRANSACTION—BURDEN OF PROOF—ERRONEOUS INSTRUCTION.**—When a party claims a right under a time contract for the sale and delivery of wheat, it is error to instruct the jury that the burden of proof is upon the defendant to show that both parties intended the transaction to be a gambling or wagering contract, and that, unless he does so, the defense that it was a gambling transaction fails. (*Bartlett v. Collins*, 928.)

See Contracts, 6, 7; Timber, 2.

SENTENCE.

See Criminal Law, 11-13.

SETOFF.

See Partnership.

SHERIFFS.

SHERIFFS—ACT OF DEPUTY.—A sheriff, or his deputy in his place, is authorized to do any act necessary to carry a decree of court into execution. (*Passumpsic Sav. Bank v. Maulick*, 539.)

See Officers, 8-12.

STARE DECISIS.

1. **STARE DECISIS—REVERSING PRIOR DECISION.**—An erroneous decision should not be continued, unless it has been so long the rule of action that greater injustice and injury will result by a reversal than by observing and following it. (*Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 17.)

2. **STARE DECISIS—WHEN DOES NOT APPLY.**—Where the decision of a tribunal is subject to review by one having superior authority over it, or the question determined may be passed upon by such tribunal in another case, the doctrine of stare decisis does not apply with full force until the same questions have been determined by the court of last resort. (*Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 17.)

STATUTES.

STATUTES — CONSTRUCTION — CONFLICTING PROVISIONS.—The rule that as between conflicting sections in the same statute the last in order of arrangement controls is applicable only when there is an irreconcilable conflict between the different sections of the same act, and no reasonable construction will harmonize the parts. (*Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 17.)

See Constitutional Law.

SUBROGATION.

SUBROGATION IS AN EQUITABLE AND NOT A LEGAL RIGHT, and cannot be enforced when it would be inequitable, or when it would work an injustice to others having equal equities. (*Makeel v. Hotchkiss*, 131.)

SURETYSHIP.

1. SURETYSHIP—IMPLIED STIPULATIONS—RIGHTS OF SURETY.—There is an implied stipulation in the usual unconditional contract of suretyship that the principal will pay the debt at maturity, and thus protect the surety, and upon his failure to do so, the surety has the right to compel payment of the debt out of the principal's estate, although the surety has made no payment before the commencement of his suit. (*Henderson-Achert Co. v. John Shillito Co.*, 745.)

2. SURETYSHIP—RIGHT OF JUDGMENT CREDITOR.—A creditor is entitled to subject to the payment of a judgment recovered on his debt any securities placed by the principal in the hands of his surety for its payment, or for his indemnity against its payment. (*Henderson-Achert Co. v. John Shillito Co.*, 745.)

3. SURETYSHIP.—THE RIGHTS OF CREDITORS through subrogation to the remedy of the sureties can in no case exceed those of the latter. Until the indemnitor's covenant has been broken, or there has been some failure to perform it, no action can be maintained thereon by either. (*Henderson-Achert Co. v. John Shillito Co.*, 745.)

4. SURETYSHIP — COVENANTS OF INDEMNITY — COVENANTS TO PAY—DIFFERENCE BETWEEN.—There is an essential difference, in legal effect, between covenants of indemnity and covenants to pay or assume a debt, as to the surety's liability thereon. A right of action accrues on those of the latter class as soon as the debt matures and is unpaid, while those of the former class are not broken, and no right of action accrues, until the indemnitee has suffered a loss against which the covenant runs. (*Henderson-Achert Co. v. John Shillito Co.*, 745.)

5. SURETYSHIP — JURISDICTION TO ENFORCE COVENANTS OF INDEMNITY.—Neither a court of equity nor of law has jurisdiction to compel an indemnitor to perform his covenant in advance of the happening of the contingency or event upon which by its terms it is to be performed. (*Henderson-Achert Co. v. John Shillito Co.*, 745.)

6. SURETYSHIP — REPLEVIN — CONTRACT OF INDEMNITY—REMEDY.—A surety in replevin has no remedy, either at law or in equity, upon a contract to indemnify him against loss on account of his suretyship until such loss occurs, and the defendant in replevin who recovers judgment against the plaintiff therein

is in the same position, although the surety and the judgment creditor are insolvent, and the judgment is uncollectible. (*Henderson-Achert Co. v. John Shillito Co.*, 745.)

7. **SURETIES—BOND—PLEAS IN BAR—REFERENCE.**—In a suit upon a penal bond where the answer raises pleas in bar which, if found in favor of the defendant, would put an end to the action, a compulsory reference cannot properly be ordered until such pleas are decided. (*Bank of Tarboro v. Fidelity etc. Co.*, 682.)

8. **SURETIES—JUDGMENT AGAINST PRINCIPAL AS EVIDENCE—TORT.**—The rule that a judgment against a principal in an official or fiduciary bond is presumptive evidence against the sureties does not apply where the action is not on the bond, but in tort. (*Martin v. Buffaloe*, 679.)

See Bankruptcy, 2; Guaranty; Insurance, 18-25; Officers; Venue.

TAXATION.

1. **TAXATION—VALUATION—RATE.**—Not only the valuation of property for the purpose of taxation, but the rate thereof as well, must be uniform. It is not within the power of the legislature to provide otherwise, either directly or indirectly. (*High School Dist. v. Lancaster County*, 525.)

2. **CONSTITUTIONAL LAW—HIGH SCHOOLS—TAXATION.**—A statute providing that pupils residing without the limits of high school districts may attend such schools free of charge, and that an arbitrary sum shall be paid out of the general fund of the county, as compensation to such high school district for such tuition, which sum may, in any case, fall below or exceed the cost of such tuition, is void, as being in violation of constitutional provisions declaring that the legislature may provide such revenue as is needed by levying a tax by valuation so that every person and corporation shall pay a tax in proportion to the value of their property, and that the legislature shall have no power to release or commute taxes, and that all taxes for municipal purposes shall be uniform in respect to the persons and property within the jurisdiction of the body imposing them. (*High School Dist. v. Lancaster County*, 525.)

3. **COUNTY BONDS—MANDAMUS TO LEVY TAX—LIMITATIONS.**—Where a board of county commissioners is empowered by statute to levy a special tax for the payment of interest on county bonds, and to provide a sinking fund for the payment of the principal of such bonds, such board, having failed and refused to provide the fund from which the interest and principal can be paid, and to which the holder alone could look for payment, may be required by mandamus to levy and collect such tax, and cannot interpose the statute of limitations as a defense. (*Davis v. Simpson*, 570.)

THREATS.

See Homicide.

TICKETS.

See Railroads, 2.

TIMBER.

1. **TIMBER—GRANT OR LICENSE.**—A grant of a right to enter upon land at any time within a specified period, and cut and remove therefrom all of the standing pine, is a conveyance of an

interest in the land, and not a mere license revocable at will. (*Bolland v. O'Neal*, 362.)

2. **TIMBER, SALE OF—NOTICE TO SUBSEQUENT PURCHASER.**—Persons who enter into the possession of land under a grant of the right to remove the timber therefrom, construct logging camps, and engage in cutting such timber, are in such open and adverse possession as to constitute notice of their right to subsequent purchasers of the land. The facts that such logging camps are more extensive than required to remove that particular timber, and that such persons are engaged in general logging operations in the vicinity are immaterial. (*Bolland v. O'Neal*, 362.)

See Contracts, 6, 7.

TORT.

See Joint Trespass.

TRESPASS.

See Injunction, 1; Joint Trespass.

TRIAL.

1. **TRIAL—PERSONAL EXAMINATION OF PLAINTIFF—POWER OF COURT TO ORDER—ACTION FOR PERSONAL INJURY.**—A court has power, in an action for a personal injury, upon a proper application of the defendant, before entering upon the trial, to order a physical examination of the plaintiff's person for the purpose of determining the nature and extent of the injuries complained of, whenever the ends of justice appear to require it, if such examination may be made without danger to the plaintiff's life or health, or the infliction of serious pain. (*South Bend v. Turner*, 200.)

2. **TRIAL—EXAMINATION OF PLAINTIFF'S PERSON.**—In an action for personal injuries, the court has no power to order the plaintiff to submit to an examination by a doctor named by the defendant. (*Stack v. New York etc. R. R. Co.*, 269.)

3. **EVIDENCE—REFUSAL TO BE EXAMINED BY PHYSICIAN—EXCLUSION.**—Where, at the trial of an action for personal injuries, the plaintiff refuses to be examined by a particular physician selected by the defendant, but offers to submit to an examination by any other physician the defendant might name, the court may properly exclude evidence of the fact that the first physician later went to the plaintiff's house, and was refused leave to examine him. (*Stack v. New York etc. R. R. Co.*, 269.)

4. **TRIAL—EXAMINATION OF PREMISES—DISCRETION OF JURY.**—Where, under the directions of the court, the examination of the property in dispute is left to the discretion of the jury, a party, who makes no request that a particular portion of the premises shall be examined, cannot complain that the jury, in the exercise of its discretion, examined only such features as, in its judgment, were desirable for the purpose of aiding a better understanding and application of the evidence. (*Beals v. Cone*, 92.)

5. **TRIAL—JURIES—SUMMONING—OBJECTION.**—After trial and verdict in a civil case, a party cannot for the first time raise an objection to the action of the court in directing a certain number of jurors to be summoned by open venire instead of calling jurors of the regular panel from the criminal division of the court who were not needed in such division at that time. (*Beals v. Cone*, 92.)

6. JURIES—APPORTIONMENT—DISCRETION OF COURT.—Where a court is conducted under two divisions, civil and criminal, the apportionment of the regular panel of jurors between such divisions is entirely in the control of the judges, and their action will not be interfered with or inquired into. (*Beals v. Cone*, 92.)

7. TRIAL—DIRECTING VERDICT.—Where a defendant denies every allegation of a complaint, the burden of proof is cast upon the plaintiff, and the court cannot direct a verdict in favor of the plaintiff, without at least leaving to the jury the credibility of the testimony. (*Gwyn Harper Mfg. Co. v. Carolina Cent. R. R.*, 675.)

8. TRIAL—OMISSION OF FACTS FROM SPECIAL FINDING—REMEDY.—If facts proved are omitted from a special finding, a *venire de novo* cannot be successfully claimed. The remedy is by motion for a new trial. (*Shirk v. Neible*, 150.)

9. TRIAL—SILENCE OF SPECIAL FINDING.—If a special finding is silent upon a point, it is equivalent to a finding upon that point against the party having the burden of proving it. (*Shirk v. Neible*, 150.)

See Instructions.

TRUSTS AND TRUSTEES.

TRUSTEES—WHEN REPRESENT BONDHOLDERS. In a suit by a trustee of a mortgage to foreclose the same, or when he is in court as a party defending the validity of bonds or protecting the interests of his beneficiaries, or when acting within the scope of the power as defined by the trust instrument, the trustee represents the bondholders, but in a suit by an unsecured creditor, to which the trustee has been improperly made a party, the trustee cannot bind the bondholders by any action he may take. (*International Trust Co. v. United Coal Co.*, 59.)

See Benefit Societies, 6; Charitable Trusts.

ULTRA VIRES.

See Municipal Corporations, 14.

USURY.

1. USURY—PROMISSORY NOTE—PURCHASE BEFORE MATURITY.—A promissory note embracing usurious interest is void in the hands of a purchaser, though before maturity and without notice. (*Faison v. Grandy*, 693.)

2. USURY—PERSONAL DEFENSE.—The defense of usury is personal to the debtor, or borrower, or other person who has an interest in the transaction which can be injuriously affected by the usury. (*Faison v. Grandy*, 693.)

3. USURY—ESTOPPEL TO URGE DEFENSE OF.—WHERE A JUDGMENT expressly provides that all issues relating to usury have been reserved, by consent, to be passed upon by a referee, a party is not estopped from raising the defense of usury upon a hearing before such referee. (*Faison v. Grandy*, 693.)

See Building and Loan Associations.

VENDOR'S LIEN.

1. VENDOR'S LIEN ON PERSONALTY.—If one street railway company while operating the line of another purchases and strings a large quantity of wire along the line of the latter company

necessary to its operation, and under agreement with it that it will repay the former company the purchase price thereof, the purchasing company, so long as it retains control and possession of the wire, is entitled to retain a lien thereon for the unpaid purchase price, although the railway line along which it is strung is transferred to a third person. (*Woodland Co. v. Mendenhall*, 445.)

2. **VENDOR'S LIENS FOR THE PURCHASE PRICE OF PERSONALTY** are not lost nor waived by the acceptance of the note of the debtor, nor by subsequent action and judgment thereon, so long as the debt remains unpaid, and the lienor retains possession and control of the property against which the lien exists. (*Woodland Co. v. Mendenhall*, 445.)

3. **VENDOR'S LIEN AGAINST PERSONALTY—POSSESSION.** Although retention of possession of personalty is necessary to the preservation of a lien thereon for the unpaid purchase price, continued, actual, physical possession is not necessary, because it is sufficient if the lien claimant retains such possession as will preserve in him the actual control of the property. (*Woodland Co. v. Mendenhall*, 445.)

VENUE.

1. **VENUE OF CIVIL ACTION—RESIDENCE OF DEFENDANT—INDEMNITY BOND.**—An action brought by a sheriff upon an indemnity bond, where there is no provision that the contract of indemnity shall be performed in any particular county, and the defendants are not served in the county of the plaintiff's residence, must be tried in the county of the defendants' residence, under a statute providing that an action shall be tried in the county where the defendants reside. (*Brewer v. Gordon*, 45.)

2. **VENUE OF ACTION—CONTRACTS.**—THE COUNTY where a contract is made does not control the county where the action shall be tried, unless the contract is to be performed in such county. (*Brewer v. Gordon*, 45.)

VISITORIAL POWER.

See Express Companies.

WATERS AND WATERCOURSES.

1. **NAVIGABLE, TIDAL WATERS.**—THE TITLE OF RIPARIAN OWNERS in navigable waters where the tide ebbs and flows extends only to high-water mark, and the state is the absolute owner of the beds of the waters beyond that mark. (*Grey v. Mayor etc.*, 642.)

2. **WATERS, WHAT PUBLIC AND WHAT PRIVATE.**—The test by which to determine whether waters are public or private is the ebb and flow of the tide, though such waters are navigable in fact. (*Grey v. Mayor etc.*, 642.)

3. **RIPARIAN OWNERS ON A NAVIGABLE STREAM ABOVE THE POINT WHERE THE TIDE EBBS AND FLOWS** have title to the bed of the stream to the middle thereof, subject only to the right of the state to regulate navigation. (*Grey v. Mayor etc.*, 642.)

4. **WATER AND WATERCOURSES—RIGHT OF COMMON USER.**—The public have the ordinary rights of usage in all bodies of public water. These rights include the right of boating, fishing, and the use of the water or ice for all ordinary purposes. In these respects a riparian owner has no exclusive or peculiar privileges. (*Sanborn v. People's Ice Co.*, 401.)

5. WATER AND WATERCOURSES—RIPARIAN RIGHTS.—

The shore owner on a public body of water may not prevent an injury to his land by the lowering or raising of the waters beyond the natural limits of high and low water mark, by artificial means, not in the exercise of rights common to all, unless such act is expressly authorized by law. The extent of the injury depends upon the condition of the shore land and the nature of the possession. (*Sanborn v. People's Ice Co.*, 401.)

6. WATER AND WATERCOURSES—RIPARIAN RIGHTS.—

Employment of contiguous land for the purpose of pleasure, recreation, and health constitutes such a use of adjacent bodies of public water as to command a remedy for an interference with its natural condition. (*Sanborn v. People's Ice Co.*, 401.)

7. WATER AND WATERCOURSES—RIGHT TO TAKE ICE.

The taking of large quantities of ice from a body of public water for the purpose of shipment to a distant market for sale, without regard to its effect upon the right of common user, is not the exercise of a common right; and if such taking results in special injury to a riparian owner, he may enjoin it, and sue in his own name for damages. (*Sanborn v. People's Ice Co.*, 401.)

8. WATER AND WATERCOURSES—RIGHT TO TAKE ICE.

The taking of water or ice from a body of public water by common right may result in destroying the source of supply, and no riparian owner or common user can complain. But when the use is made of such water for commercial purposes, not of common right, the right to so use cease at the point where the conflict of interest with the common user commences. (*Sanborn v. People's Ice Co.*, 401.)

9. WATER AND WATERCOURSES—RIGHT TO TAKE ICE.

The taking of ice from a body of public water as a business, for shipment to a distant market for sale, is not an ordinary use of the water by common right, but is an artificial taking which may be enjoined by a riparian owner specially injured thereby. (*Sanborn v. People's Ice Co.*, 401.)

10. WATERS AND WATERCOURSES—TAKING ICE—SUB-

STANTIAL INJURY.—If a body of public water is, during twelve years, lowered two feet below its natural outlet by cutting and removing ice therefrom for commercial purposes, and from the evaporation caused thereby, such taking is of a substantial character, entitling the shore owner specially damaged thereby to an injunction restraining the continuance thereof. (*Sanborn v. People's Ice Co.*, 401.)

11. WATERS — NAVIGABLE — QUESTION OF FACT.—

Excepting salt-water streams, the question as to the navigability of a stream is one of fact, to be established by those who seek to use it as such; and the stream must be navigable in its natural state, unaided by artificial means or devices. (*Griffith v. Holman*, 821.)

12. WATERS—FRESH-WATER RIVER—WHEN NOT NAVI-

GABLE.—An unmeandered fresh-water river is a non-navigable stream, where it has during high water, for about three months of the year, an average width of forty feet and depth of four feet, and for the rest of the year, and for about twenty years, has had an average width of forty feet and depth of two feet, the width and depth, however, varying at all seasons of the year, sometimes being more than forty feet wide and only six inches in depth, and which river has never been navigated, except by ordinary row-boats run up and down therein by persons desiring to fish for pleasure. (*Griffith v. Holman*, 821.)

13. WATERS.—THE TITLE TO THE BED OF A NON-NAVIGABLE FRESH-WATER STREAM is in the adjacent riparian proprietors to the center of the stream; and one who owns both banks bordering on such a stream has title to the land in its bed, and may lawfully maintain a fence across it. (*Griffith v. Holman*, 821.)

14. WATERS — NON-NAVIGABLE STREAMS — RIGHT OF FISHERY.—The owner of land, through which flows a non-navigable fresh-water stream, has an absolute, exclusive right of fishery therein, on his own land, which right must, however, be so exercised as not to injure the rights of others on the stream, above or below. (*Griffith v. Holman*, 821.)

15. WATERS—BEDS OF LAKES—TITLE TO—VESTING OF, IN STATE.—The title to the beds of all lakes, ponds, and navigable rivers, up to the line of ordinary high-water mark, within the boundaries of the state, became vested in it at the instant of its admission into the Union, in trust for the benefit of its people, so as to preserve to them forever the enjoyment of the waters of such lakes, ponds and rivers to the same extent that the public are entitled to enjoy tidal waters at the common law. (*Illinois Steel Co. v. Bilot*, 905.)

16. WATERS—BEDS OF LAKES—GOVERNMENT PATENT TO—WORTH OF.—The title to lands under lakes, ponds, and navigable rivers of the state was never in the United States, except in trust for public purposes; and a patent from the United States, covering such lands, whether made before the state was admitted into the Union or thereafter, conveys no title. A government patent of land bordering on a lake or pond, regardless of the boundaries thereof according to the government survey, does not convey title to the lands below the line of ordinary high-water mark. (*Illinois Steel Co. v. Bilot*, 905.)

17. WATERS—BEDS OF LAKES AND NAVIGABLE RIVERS —TITLE TO—POWER TO CHANGE.—Except with respect to a qualified title to submerged lands of rivers navigable in fact, conceded to shore owners, but which is not permitted to displace or materially affect public rights, the title to lands under lakes, ponds, and navigable rivers of the state is in the state, and it is powerless to change it. It cannot transfer such title by grant or otherwise. (*Illinois Steel Co. v. Bilot*, 905.)

18. WATERS—BEDS OF LAKES—TITLE TO—CHANGE OF, BY FILLING.—The title to land under lakes and ponds, held by the state, does not change by reason of the fact that such lakes or ponds are artificially filled, so as to raise the land above the surface of the water. (*Illinois Steel Co. v. Bilot*, 905.)

19. WATERS—BEDS OF LAKES—PATENT TO, WHEN A NULLITY—PLATTING—EFFECT OF.—It is the physical fact of whether patented land is in a lake or not that governs. If it is shown upon the government plat to be dry land and it is sold as such, but in fact it is within the boundaries of a lake, the paper from the government purporting to convey title thereto is a nullity. The platting of land in the bed of a lake as dry land does not affect the title thereto. It is the fact of its being in the bed of a lake which governs, not the mapping of the territory by the government. (*Illinois Steel Co. v. Bilot*, 905.)

20. WATERS—WHAT DOES NOT PRECLUDE A BODY OF WATER FROM BEING A LAKE.—The mere fact that water is very shallow, so that marsh grass appears above the surface; that it is called a marsh; that the water is not deep enough to

admit of navigation; or that the surface is not at all times wholly submerged, does not preclude its being in fact a lake. Neither does the size or depth of a body of water solve the question of whether it is a lake or a river. (Illinois Steel Co. v. Bilot, 905.)

21. **WATERS—LAKES AND RIVERS.—NO TITLE BY PATENT** from the government can be obtained to land which is inside of the natural shore of a lake, or of any body of water not a river, so that the water does not merely beat upon it as a shore, but covers it; or to land covered by water, not a part of a lake, yet not a part of a river. (Illinois Steel Co. v. Bilot, 905.)

22. **WATER RIGHTS — ESTOPPEL — LACHES—ABANDONMENT.**—A prior appropriator of water is not estopped by his own laches from asserting his rights against subsequent appropriators, where during several years of scarcity he was short of water, knew that such shortage was caused by diversions made by such subsequent appropriators, and made no protest against these diversions. (Lower Latham Ditch Co. v. Loudon Irr. etc. Co., 80.)

23. **WATER RIGHTS—RIGHT OF PRIOR APPROPRIATOR—DEFENSE.**—In an action by a prior appropriator of water against subsequent appropriators who have wrongfully diverted water from him, it is no defense that others junior in point of time to the defendants may have diverted water which, if allowed to flow down the stream, would have supplied the needs of both the plaintiff and the defendants. (Lower Latham Ditch Co. v. Loudon Irr. etc. Co., 80.)

24. **WATER RIGHTS—LOSS THROUGH PERCOLATION—PRIORITY.**—In an action by a prior appropriator of water to prevent junior appropriators above him from diverting the waters of a stream, it is no defense that a considerable volume of such waters would be lost through percolation before they reached the plaintiff's ditches. (Lower Latham Ditch Co. v. Loudon Irr. etc. Co., 80.)

See Adverse Possession; Ejectment; Municipal Corporations, 17-21.

WILLS.

1. **WILLS—CHARITABLE TRUSTS.**—It is competent for a testator to devise property to a trustee with power in him to select or designate the object or objects upon which the charity is to be disposed. (St. James' Orphan Asylum v. Shelby, 553.)

2. **WILLS—CHARITABLE TRUSTS.—COURTS VIEW FAVORABLY** donations by will for charitable purposes, and will endeavor to carry them into effect where this can be done consistently with the rules of law. (St. James' Orphan Asylum v. Shelby, 553.)

3. **WILLS—CHARITABLE TRUSTS—INDEFINITENESS.**—If a testator creating a trust to a charitable use defines the intention of the trust, and invests the trustee with discretionary power over the application of his bounty to the objects, for the purposes intended, the bequest cannot, be held invalid so long as there is no obstacle to the exercise of the power confided to the trustee. (St. James' Orphan Asylum v. Shelby, 553.)

4. **WILLS—CHARITABLE TRUSTS—POWER CONFERRED ON TRUSTEE—INDEFINITENESS.**—If ample power is conferred, by will upon a trustee to relieve a bequest to charity of all objections arising from its definiteness, and no obstacle exists to the exercise of that power, courts cannot interpose to prevent its exercise. (St. James' Orphan Asylum v. Shelby, 553.)

5. **WILLS—CHARITABLE TRUSTS—POWERS CONFERRED ON TRUSTEE.**—If, in the creation of a charitable trust, certain

and ascertainable trustees are appointed with full power to select the beneficiaries and devise a scheme or plan of application of the funds appropriated to the charitable object, the court will, through the trustees, execute the charity. In such case, the exercise of the power vested in the trustees is deemed to be an expression of the will of the testator. (*St. James' Orphan Asylum v. Shelby*, 553.)

6. **WILLS—CHARITABLE TRUSTS—POWER OF TRUSTEE.** A bequest by will to a charity unnamed, to be selected by the trustee therein named, may be valid, the only limitation being that the object must be a charitable one according to the intention of the testator. (*St. James' Orphan Asylum v. Shelby*, 553.)

7. **WILLS—CONSTRUCTION—INTENTION OF TESTATOR.**—A will must be construed with a view of carrying out the intention of the testator, and unless there is something in it contrary to the law of the state, or in contravention of public policy, no reason exists for declaring it invalid. (*St. James' Orphan Asylum v. Shelby*, 553.)

8. **WILLS — CHARITABLE TRUSTS — INDEFINITENESS.**—If a bequest for a charitable purpose, though entirely general and uncertain in its character, is made to a trustee, who is empowered to select the object of the charity, and who is willing to accept, or has accepted, the trust, the will cannot be declared invalid because of the general nature of the object or objects of the charity. (*St. James' Orphan Asylum v. Shelby*, 553.)

WITNESS.

EVIDENCE — CONVERSATION BETWEEN HUSBAND AND WIFE.—The fact that a conversation between a husband and wife accompanies and explains an act of hers is not sufficient to take it out of the rule that neither husband nor wife shall be allowed to testify as to private conversations with each other. (*Fuller v. Fuller*, 273.)

WRONGFUL DEATH.

See Death.

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